**Boar's Head Provisions Co., Inc. *and* United Food & Commercial Workers International Union (UFCW), AFL–CIO.** Cases 07–CA–209874 and 07–CA–212031

May 6, 2021

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS EMANUEL AND RING

On May 14, 2020, Administrative Law Judge Thomas M. Randazzo issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to

[1] The Respondent has excepted to some of the judge's credibility determinations. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent additionally excepts to the judge's finding that Supervisors Guadalupe Rodriguez and Maria Mendoza did not possess "an office or other location of authority at the plant." We find merit to this exception but find that their respective interrogations of employees Walter Aguilar and Elba Rivas were nevertheless coercive under the totality of the circumstances. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), enfd. sub nom. *Hotel Employees, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[2] We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) when, during the course of a coercive interrogation, Supervisor Rodriguez threatened that negotiations would start from "zero to minimum" if employees voted for the Union as their collective-bargaining representative. Accordingly, we find it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(1) through similar statements made by Corporate Director of Human Resources Scott Habermehl and distributed to employees in the "Boar's Head Brand" document because such findings would be cumulative and would not affect the remedy.

Chairman McFerran would adopt the judge's conclusions that the "zero to minimum" statements made by Supervisor Rodriguez during his unlawful interrogation of employee Aguilar and by HR Director Habermehl during mandatory employee meetings, as well as the "Boar's Head Brand" document, which included that statement and was attached to employees' paychecks, each independently constitute Sec. 8(a)(1) violations.

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) by telling an employee that it would be futile for employees to select the Union as their collective-bargaining representative, we note that the Respondent asserts on exception only that the judge erred in crediting the testimony of employee Ascension Rios that the statement was made; it does not argue that the statement, if made, was lawful. In describing Rios' testimony, the judge mistakenly stated that the conversation at issue occurred on December 6, 2017, rather than on or about September 12, 2017. The judge's inadvertent mistake does not affect our decision.

We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) by promising to improve employees' benefits if they did not select the Union as their collective-bargaining representative, and then granting these benefits. Accordingly, we find it unnecessary to pass on the judge's determination that the Respondent's conduct additionally violated Sec. 8(a)(3), as this additional finding would not materially affect the remedy. We have amended the judge's conclusions of law consistent with our findings.

The judge determined that the Respondent violated Sec. 8(a)(3) and (1) by raising Apolonia Rios's wage and providing her backpay to induce her to abandon support for the Union. Although the General Counsel's complaint did not expressly allege that this provision of benefits during the course of a union organizing campaign independently violated Sec. 8(a)(1), this allegation is closely connected to the Sec. 8(a)(3) and (1) allegation regarding the same conduct, and the matter was fully litigated. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Having found that this issue is appropriately before the Board, we conclude that the Respondent independently violated Sec. 8(a)(1) by increasing employee Apolonia Rios's wages and giving her backpay. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *Vista del Sol Healthcare*, 363 NLRB 1193, 1193 fn. 2 (2016) (finding grant of wage increases to two employees during union organizing campaign violated Sec. 8(a)(1), citing, inter alia, *Exchange Parts*). Accordingly, we find it unnecessary to pass on the judge's conclusion that the same conduct also violated Sec. 8(a)(3), as this additional finding would not materially affect the remedy.

We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) by unlawfully surveilling employee handbilling activity in its parking lot on October 25, 2017. Accordingly, we find it unnecessary to pass on the complaint allegations alleging the same conduct on October 11, October 18, and November 16, because such findings would be duplicative and would not affect the remedy.

In adopting the judge's finding that the Respondent engaged in unlawful surveillance on October 25, we reject the Respondent's argument that it was prejudiced by the judge's decision to permit the General Counsel to amend the complaint allegation at the end of the hearing. The Respondent cites *Bruce Packing Co. v. NLRB* for the proposition that "[w]hen a late amendment deprives an employer of notice and the opportunity to fairly litigate its liability, we will find prejudice warranting reversal so long as there is even a chance that the company could have successfully defended against the charge." 795 F.3d 18, 24 (D.C. Cir. 2015). We find, pursuant to *Bruce Packing Co*., that the Respondent could not have successfully defended against the unlawful surveillance charge here. As found by the judge, "the Respondent called and elicited testimony from most, if not all, of the Respondent's witnesses that were involved in the alleged surveillance activity," and the clear record evidence establishes that the Respondent treated employee handbilling activity in a disparate manner compared to other, non-union employee activity, e.g., the selling of fruit and vegetables from employees' vehicles, which the Respondent permitted in its parking lot.

adopt the recommended Order as modified and set forth in full below.[3]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 4.

4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by increasing benefits for employee Apolonia Rios by raising her wages and paying her retroactive backpay.

ORDER

The National Labor Relations Board orders that the Respondent, Boar's Head Provisions Co., Inc., Holland, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of benefits, including "donning and doffing" time and bonuses, if the employees select the Union as their collective-bargaining representative.

(b) Threatening employees that negotiations would start from "zero to minimum" if the employees select the Union as their collective-bargaining representative.

(c) Coercively interrogating employees about their union membership, sympathies, or support.

(d) Soliciting employee complaints and grievances and promising to remedy them to discourage employees from selecting the Union as their collective-bargaining representative.

(e) Placing employees under surveillance while they engage in union or other protected concerted activities.

(f) Maintaining an overbroad rule in its Employee Handbook that prohibits employees from wearing "unauthorized badges, pins, or other items on helmet or exterior garments" in non-production areas.

(g) Promising or granting employees increased benefits, including an increase in wages, increased vacation and attendance benefits, or by providing hand tools at no cost for maintenance employees, to induce employees to abandon support for the Union.

(h) Threatening employees that the Union would not be able to get them reinstated if the Respondent discharged them and that employees would "end up in court" or be "taken to court," thereby implying or informing employees that selecting the Union would be futile.

(i) Granting wage increases or retroactive backpay in order to discourage employees from supporting the Union.

(j) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind the rule in its Employee Handbook that prohibits employees from wearing "unauthorized badges, pins, or other items on helmet or exterior garments" in non-production areas.

(b) Furnish employees with an insert for the current Employee Handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees revised Employee Handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

(c) Post at its Holland, Michigan facility copies of the attached notice marked "Appendix."[4] The notices shall be posted in English and Spanish, and any other languages spoken by employees at Respondent's Holland, Michigan facility. Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to

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Member Emanuel would dismiss the complaint allegations alleging unlawful surveillance. He notes that on October 11, employee handbilling activity caused traffic to build up in the parking lot, necessitating intervention by the Respondent's security officers to alleviate the traffic concerns. Therefore, under the Board's test in *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982), Member Emanuel would find that the Respondent's security officers did not act in a manner "out of the ordinary" by continuing to observe handbilling activity in the parking lot on October 11 and subsequent dates.

In affirming the judge's decision as modified, we do not rely on *Onsite News*, 359 NLRB 797 (2013), *Station Casinos, LLC*, 358 NLRB 1556 (2012), or *Garda CL Great Lakes, Inc.*, 359 NLRB 1334 (2013), cited by the judge, as those decisions were invalidated by the Supreme Court in *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

[3] In light of our adoption of the judge's finding that the Respondent's dress code policy was unlawfully overbroad when applied to its non-production areas, we shall modify the judge's recommended Order with respect to this violation to apply only to non-production areas in accordance with our decision in *W San Diego*, 348 NLRB 372, 376 (2006). We shall substitute a new notice to conform to the Order as modified.

[4] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 6, 2021

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Lauren McFerran, Chairman

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William J. Emanuel, Member

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John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with loss of benefits, including "donning and doffing" time and bonuses, if you support or choose to be represented by the United Food and Commercial Workers International Union, AFL–CIO (the Union) or any other labor organization.

WE WILL NOT threaten you that negotiations will start from "zero to minimum" if you select the Union as your collective-bargaining representative.

WE WILL NOT coercively question you about your union membership, sympathies, or support.

WE WILL NOT solicit complaints and grievances from you and promise to remedy them in order to discourage you from selecting the Union as your collective-bargaining representative.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT maintain an overbroad rule in our Employee Handbook that prohibits you from wearing "unauthorized badges, pins, or other items on helmet or exterior garments" in non-production areas.

WE WILL NOT promise or grant you increased benefits, including an increase in wages, increased vacation and attendance benefits, or by providing hand tools at no cost for maintenance employees, in order to induce you to abandon support for the Union.

WE WILL NOT threaten you by telling you that the Union will not be able to get you reinstated if we discharge you, and that you would "end up in court" or be "taken to court," thereby implying that it would be futile to select the Union as your collective-bargaining representative.

WE WILL NOT give you wage increases or pay you retroactive backpay in order to discourage you from supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the rule in our Employee Handbook that unlawfully prohibits you from wearing "unauthorized badges, pins, or other items on helmet or exterior garments" in non-production areas.

WE WILL furnish you with an insert for the current Employee Handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

BOAR'S HEAD PROVISIONS CO., INC.

The Board's decision can be found at https://www.nlrb.gov/case/07-CA-209874 or by using the QR code below. Alternatively, you can obtain a copy of

the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, DC 20570, or by calling (202) 273–1940.

*Colleen Carol, Esq.* and *Steven Carlson, Esq.,* for the General Counsel.
*Sarai K. King, Esq.,* for the Charging Party.
*Richard D. Alaniz, Esq., Brett Holubeck, Esq.,* and *John E. Cruickshank, Esq.,*[1] for the Respondent.

## DECISION

### STATEMENT OF THE CASE

THOMAS M. RANDAZZO, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on December 10–14, 2018, April 29–30, and May 1–3, 2019. It arose out of a series of unfair labor practice charges filed by the United Food & Commercial Workers International Union (UFCW), AFL–CIO (the Union or Charging Party) against Boar's Head Provisions Co., Inc. (the Respondent). The instant charges in Case No. 07–CA–209874 were filed on November 9, 2017,[2] and the charges in Case No. 07–CA–212031 were filed on December 21, 2017.[3] The General Counsel issued the consolidated complaint and Notice of Hearing (complaint) on April 27, 2018, alleging 35 unfair labor practice violations. The Respondent denied in its answer to the complaint that it violated the Act as alleged.[4]

At the close of the hearing the General Counsel's motion to withdraw four complaint allegations (5(b), 8(a), 11, and 15), and his motion to amended 12(a)–(d) from alleging that Respondent denied off duty employees' access to the parking lots to alleging that Respondent engaged in surveillance and created the impression that employee's union activities were under surveillance, was granted. In addition, the General Counsel's motion in his post-hearing brief to withdraw seven more complaint paragraphs (7(b), 8(c), 13, 14, 16(c), 18(b) and 19) was also granted. The remaining complaint allegations therefore assert that the Respondent violated Section 8(a)(1) of the Act by: (1) threatening employees with the loss of benefits by telling them negotiations would start from scratch of they selected the union; (2) interrogating employees about their Union membership and activities; (3) soliciting employee grievances and promising to remedy those grievances if employees abandoned their support for the Union; (4) engaging in surveillance and creating the impression of surveillance that employee's union activities were under surveillance; (5) soliciting employee complaints and promising increased benefits and improved terms and conditions of employment if the employees did not select the Union as their bargaining representative; (6) telling employees that the Union would not be able to get them reinstated if Respondent terminated them, thereby informing them it would be futile for them to select the Union; and (7) maintaining an overly broad dress code. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by: (1) suspending and disciplining union supporter Walter Aguilar; (2) increasing wages and benefits of union supporter Nelson Langarita; (3) increasing the wages of union supporter Apolonia Rios; (4) improving the attendance and vacation policies for all employees; and (5) providing maintenance employees with hand tools in order to discourage their Union membership and activities.

On the basis of the entire record,[5] my determination of credible evidence,[6] and after considering the briefs filed by the General Counsel, the Union, and the Respondent,[7] I make the following:

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent has been a corporation with an office and place of business in Holland, Michigan, and it has been engaged in the manufacture and non-retail sale and distribution of delicatessen products. During the calendar year ending December 31, 2017, Respondent, in conducting its operations, purchased and received at its Holland, Michigan facility, goods valued in excess of $50,000 directly from points outside the State of Michigan. The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] After the first of the 2 weeks of trial, John E. Cruickshank withdrew as counsel for the Respondent.

[2] All dates are in 2017 unless otherwise indicated. Amended charges were filed in Case 07–CA–209874 on January 18, 2018, February 13, 2018, February 28, 2018, and March 30, 2018.

[3] Amended charges were filed in Case 07–CA–212031 on February 13, 2018 and March 30, 2018.

[4] On November 8, 2018, the Respondent filed a Motion for Partial Summary Judgment with the Board requesting dismissal of complaint para. 24 which alleged that "In about August 2017, Respondent increased the benefits of its employees by improving that attendance and vacation policies." In an order dated December 6, 2018, the Board denied Respondent's motion, finding that Respondent failed to establish that there are no genuine issues of material fact warranting a hearing.

[5] By Order dated July 16, 2019, the Respondent's "unopposed Motion for Corrections to Transcript" was granted. Abbreviations used in this decision are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibit; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for the General Counsel's Brief; "R. Br." for Respondent's Brief; and "RR. Br." for Respondent's Reply Brief.

[6] In making my findings regarding the credible evidence, including the credibility of witnesses, I considered the testimonial demeanor of such witnesses, the content of their testimony, and the inherent probabilities based on the record as a whole.

[7] On September 18, 2019, the Respondent filed a post-hearing motion for leave to file a reply brief and it attached its reply brief. The motion was granted and the reply brief has been considered in this matter.

## II. ALLEGED UNFAIR LABOR PRACTICES

### *A. The Facts*

#### 1. Background

The Respondent is headquartered in Sarasota, Florida, where it operates eight facilities throughout the United States processing and distributing meats, including five manufacturing and three distribution facilities. Three manufacturing facilities—Holland, Michigan, New Castle, Indiana, and Forrest City, Arkansas—are non-union facilities. The Respondent's manufacturing facilities in Jarratt, Virginia and Petersburg, Virginia have employees represented by the UFCW.[8] (Tr. 33–35.) There are approximately 600 employees at the Holland facility, with around 540 hourly employees that work three shifts. (Tr. 36, 666, 1145.) The plant is separated into the "Raw" side, where raw meat is brought in to be cooked, and the "Ready to Eat" or "RTE" side, where the cooked meat is packaged, boxed, and distributed. The production employees at the Holland facility are predominantly Spanish-speaking.

The Respondent's management personnel involved in this case include: Scott Habermehl, director of human resources (located at corporate headquarters in Florida); Larry Helfant, the senior vice president of operations (also located at the corporate headquarters); Bradley Rurka, Holland plant manager; Shannon Van Noy, human resources business partner; Leah Cochran, HR senior coordinator; Ronald Ortega, facility security supervisor; Guadalupe Rodriguez, supervisor of sanitation; Vincente Nunez, senior HR coordinator; Maria Mendoza, production supervisor, and Carlos Giron, production assistant supervisor.[9]

Shannon Van Noy, the highest-ranking human resource manager at the Holland facility, oversees the human resources representatives who are responsible for effectuating the labor relations and personnel policies within the plant. (Tr. 643.) Human resource representatives Vincente Nunez and Rodolfo Rodriguez are both fluent in Spanish and serve, when needed, as interpreters for the managerial staff and the employees. (Tr. 1120–1121, 1215–1216.) Van Noy and the Holland human resources staff report to Habermehl.

#### 2. The Respondent's policies and rules in effect during the time of the alleged unfair labor practice violations

In 2017 and at all material times, the Respondent maintained an employee handbook for employees which included stated examples of behavior that Respondent considered "Class II Offenses," such as misconduct that is "serious and will result in progressive discipline." (GC Exh. 2.) Included in the Class II offenses is provision 2.9 which provides: ". . . wearing unauthorized badges, pins or other items on helmet or exterior garments."

In addition, in the summer of 2017, the Respondent maintained vacation and attendance policies for employees which had been effective since around 2015 and were the same at all its non-union plants. (Tr. 805–806; 1064.) Those policies, by their very nature, were intertwined. (Tr. 806.) The Respondent was aware in 2015 that the insufficiencies in its vacation and attendance policies were a main cause of employee dissatisfaction, and human resources regularly heard about such concerns from employees.[10] (Tr. 1064, 1563–1564.) The policies did not provide for any sick leave or vacation time for first year employees, and employees with 1–3 years of seniority earned only 5 days of vacation, employees with 3–10 year seniority earned 10 days, and employees with 10 years of more seniority earned 15 days. (Tr. 1062, R. Exh 12.) Many employees therefore incurred attendance points for any absences, even if they were related to documented medical or family issues. Half-a-point was issued for a tardy or an absence under 4 hours, and absences of more than 4 hours resulted in the issuance of a full attendance point. (Tr. 720–721.) In addition, while employees with higher seniority could use their vacation time for medical appointments, the Respondent did not allow vacation time to be taken in any increments under 8 hours, so employees had to take an entire day of leave for medical appointments even if they were of the shortest duration. (Tr. 720–721.) In the alternative, those employees could incur attendance points for shorter absences and thereby risk being discharged after accumulating 10 points. (Tr. 1563–1564.)

The attendance policy also provided that attendance points accumulated by the employees remained on their records and would only be removed or "drop off" after 60 days of perfect attendance. (GC Exh. 7; Tr. 398, 400, 666, 710, 805, 849, 1043, 1563, 1642.) The policy effective from 2015–2017 differed from the earlier policy which allowed attendance points to be dropped after 30 days of perfect attendance. (Tr. 398, 805.) It is undisputed that the 2015–2017 vacation and attendance policies were unpopular and a source of complaints by employees to management.[11] (Tr. 805, 1039, 1064, 1563.) While the Respondent acknowledged the employees' dislike of those policies and the shortcomings those policies had on employee retention, Van Noy nevertheless informed Habermhel in February 2017, months before the Union's organizing drive, that she believed the policies were "lenient." (R. Exh. 12(j)(2).) Even though changes to the policies were discussed by management from 2015 to 2017, no changes were made, approved, or announced prior to the commencement of the Union's organizing drive in July 2017. (R. Exh. 12; Tr. 804–805.) In fact, efforts by Habermehl to enhance or change the policies to address employee turnover at the facility had been steadfastly rejected by Respondent's corporate management for 2 years before the commencement of the Union's organizing campaign. (R. Exh. 12; Tr. 853, 1538–1539, 1583.)

In 2017, the Respondent also maintained a policy applicable to only its maintenance employees where it required those employees to buy and provide their own tools. Under that policy, the Respondent would loan the employees $500 to purchase their

[8] The Respondent also has distribution facilities in Brooklyn, New York and Edison, New Jersey, which have employees represented by the UFCW Local 342, and one in Columbus, Ohio, which is a non-union facility. (Tr. 34–35, 83.)

[9] The Respondent admitted that these individuals are supervisors and agents of the Respondent within the meaning of Sec. 2(11) and 2(13) of the Act, respectively.

[10] Cochran acknowledged that as far back as 2015, employees expressed their dissatisfaction with Respondent's vacation and attendance policies through employee "stay and exit interview." (Tr. 1064.)

[11] Habermehl admitted that he heard about "push back" from employees as early as 2015 concerning the attendance policy and how long it would take to have attendance points drop off. (Tr. 1563–1564.)

tools, but the employees would then have to pay the Respondent back for those tools over time through payroll deductions. (Tr. 366.)

3. The Union's organizing campaign in August 2017

Although there is evidence of earlier union activity at the Holland plant, such as in 2016 when the Respondent found some unsigned union authorization cards at the facility, in the summer of 2017 the UFCW International Union started an organizing drive at the Holland plant that Van Noy described as the "most aggressive" organizing drive. (Tr. 733–739.) The record reflects that on August 9, 2017, Van Noy and Leah Cochran were aware that the Union organizers had visited some of the Respondent's maintenance employees and that those employees were considering organizing. Those managers were also aware that one of the issues for those employees was the Respondent's requirement that they purchase their own work tools to perform their jobs. Van Noy and other human resources employees, such as Cochran, immediately brought the Union organizing efforts to Habermehl's attention at corporate headquarters. (Tr. 65.) Habermehl acknowledged that in his conversation with Cochran, she told him that the maintenance employees in Holland were "unhappy" about having to purchase tools for work. (Tr. 65.) Habermehl, in turn, notified Senior Vice President of Operations Larry Helfant of the Union's campaign. In an email dated August 9, Habermehl informed Helfant that the Union was organizing the maintenance employees and he heard that the Union organizer ". . . promised that the Union would buy them tools. . . . and fix all of their lock out problems." (GC Exh. 4.) Habermehl also stated that "[m]ost concerning is that the employee said most of the maintenance guys are ready to sign [union authorization] cards." Habermehl and Helfant then agreed to coordinate a "strategy for communicating [their] message." (GC Exh. 4.)

4. The Company's response to the Union's organizing campaign

The Respondent did not want its Holland facility to be unionized. (Tr. 649.) Upon learning of the Union's organizing drive, Respondent's corporate and local management officials began to research and strategize ways to provide dissatisfied employees with a remedy for the conditions of work that could have pushed them towards unionization. (R. Exh. 12(r)(1), GC Exh. 8.) The managers inquired from the other facilities exactly what items were purchased for or provided employees, such as personal protective equipment (PPE), work boots/shoes, safety glasses, and tools, and they discussed whether similar policies could be enacted at the Holland facility. (R. Exh. 11 and 12.) Respondent also began to revisit the possibility of changing its attendance and vacation policies. (R. Exh. 12; Tr. 1575–1577.) In a document entitled "Explanation of Changes to Policies," which Respondent provided employees in late August 2017, the Respondent acknowledged and informed the employees that it was ". . . in the process of determining whether other plants provide more PPE to their employees at no cost . . ., [and] [i]f true, changes will be made so Holland employees are treated the same." (GC Exh. 7.) Habermehl acknowledged that after he learned of the Union's organizing campaign, he was "involved in the investigation of what was being paid . . . so that [he] could try and make it consistent at Holland." (Tr. 1576–1577.)

5. The mandatory meetings with employees in response to the Union's organizing campaign held by Scott Habermehl on or about August 21 and 22, 2017.

On August 21, 2017, within 2 weeks of learning about the Union's campaign, Habermehl travelled from the corporate headquarters in Florida to the Holland facility to personally deliver Respondent's message in response to the organizing drive. (Tr. 51–52.) The Company's response was to "educate employees on signing union authorization cards" and to educate them on how the election process worked. (Tr. 656.) The record reflects that when employees asked Habermehl why he was there to talk to them, he told them that he visited every year and that was the reason he was there. (Tr. 62–63.) However, Habermehl acknowledged at trial that his stated reason was not true, and that he was there for the Union organizing drive. (Tr. 62–63.) In fact, he testified that he moved his visit and meetings with employees up from a later scheduled date because Cochran told him about the Union campaign. (Tr. 63–64.)

On August 21 and 22, Habermehl delivered his message to all production and maintenance employees on all three work shifts. Habermehl held five meetings, one on August 21 and four on August 22, with each meeting lasting approximately 1-hour in duration. (Tr. 1588–1595.) In those meetings he delivered a power-point presentation without use of a script regarding unionization and why it was not in the best interest of the employees. (GC Exh. 27; Tr. 52–53.) The first meeting was translated into Spanish by human resources employee Vicente Nunez, and the remainder of the meetings were translated by Rodolfo Rodriquez. (Tr. 52–54.)

At each of the meetings, Habermehl talked about the unionization process, compared the wages of the employees at the unionized Jarret, Virginia facility with the wages of the employees in Holland. (Tr. 394–395.) He also discussed union authorization cards and what would happen if the Respondent and Union conducted negotiations for a contract and what impact it would have on employees. At the first meeting at 6:30 a.m., employees Walter Aguilar and Nelson Langarita made statements about the benefits of the unionized workforce. In particular, Langarita made a comment about the unionized employees having benefits, and Aguilar made a statement that employees in the Virginia plant receive two pairs of boots for free. (Tr. 118, 132.) In addition, employee Ascension Rios participated in the meeting he attended by asking why he had only 3 weeks of vacation after 19 years of work, when he deserved 4 weeks of vacation. (Tr. 265.) According to Rios, Habermehl responded that that was "something . . . that they will be seeing on [sic] the future." (Tr. 265.)

With regard to Habermehl's statements on how negotiations would work, the testimony varied. Aguilar testified that in the 6:30 a.m. meeting he attended, Habermehl stated that negotiations would start from "zero to the minimum and that a lot of benefits . . . could be lost." (Tr. 115–117.) In addition, Apolonia Rio (Ascension Rios' spouse) testified that Habermehl told the employees in the meeting she attended that if the Union came in "we would start at zero." (Tr. 394–395.)

Habermehl testified that when he was discussing negotiations, he did not say that Respondent would start from zero, minimum

wage,[12] or "scratch." (Tr. 73, 1496–1511.) Despite that denial, he did acknowledge that he mentioned "minimum wage" in a hypothetical where he stated that if the Union asked for $50 an hour, the Company could respond with an initial starting point of minimum wage. (Tr. 74.) He then went on to tell the employees that "when it was all said and done, that we would find a place in the middle and that employees may have less or more than they have now." (Tr. 73.)

Unlike the testimony of Aguilar and Apolonia Rios, some employees did not recall that Habermehl said negotiations would start from zero to the minimum. The evidence, however, reflects that most of those employees did not attend the same meeting as Aguilar. Jorge Torres attended the afternoon meeting and denied that Habermehl said negotiations would start from scratch or zero. (Tr. 1183–1186, 1196–1197.) Employee Abigail Forsten also denied hearing Habermehl say that negotiations would start from scratch or zero, but she did not specify which meeting she attended. (Tr. 1157–1159, 1166–1169.) Likewise, employee Gabriela Esquivel denied that Habermehl said bargaining would start from scratch or zero, but she did not indicate whether she attended the same meeting as Aguilar and she did not recall much about what happened in the meeting she attended. (Tr. 1387–1390.)

Van Noy denied that Habermehl stated that negotiations would start "from scratch" or from zero, but she does not speak Spanish. (Tr. 795–796.) Cochran, who is also fluent in Spanish, testified that she attended 2–3 of the meetings, but she did not specify which meetings she attended. (Tr. 1065–1070.) She denied that he stated bargaining would start "from scratch" because that phrase does not exist in the Spanish language. (Tr. 1067–1068.) However, Respondent witness Rodolfo Rodriguez, who attended the first meeting, alluded to hearing Habermehl mention statements similar to bargaining "from zero to the minimum," testifying that at some point Habermehl mentioned a "blank piece of paper" when talking about negotiations.[13] (Tr. 1223–1224, 1250.)

Although the evidence does not establish that Habermehl used the exact phrase "bargain from scratch" when discussing the Respondent's bargaining approach if the Union was voted in, there is conflicting testimony as to whether he said that negotiations would start from zero to the minimum as attested to by Aguilar and Rios. As the trier of fact, a determination on the credibility of these witnesses is therefore required. Credibility determinations may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the evidence, established or admitted facts, reasonable inferences that may be drawn from the record as a whole, and the inherent probabilities of the allegations. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions. Indeed, nothing is more common than for a judge to believe some, but not all, of the testimony of a witness. *Daikichi Sushi*, 335 NLRB at 622; *Jerry Ryce Builders*, 352 NLRB 1262, fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951).

My observation during the trial was that Aguilar appeared to be truthful and honest in his demeanor, and he testified consistently[14] and convincingly as to what was said at the meeting he attended. Besides being a credible witness, Aguilar is a current employee of the Respondent, which tends to be particularly reliable because his testimony goes against his pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn.22 (1977) (The testimony of current employees which is adverse to their employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason is not likely to be false"). Apolonia Rios was also a very credible witness who testified in a very honest and forthright fashion.

Habermehl, on the other hand, was not a credible witness. His testimony at times appeared less than honest[15] and parts of his testimony were contradictory[16] and not believable. He was also evasive when questioned about the Company's position on whether Respondent wanted the Holland facility to remain union-free (Tr. 48–51), and when testifying that he did not recall that Leah Cochran told him a Union organizer had visited a maintenance employee and had a long talk with him, or that she told him the organizer promised to buy the maintenance employees tools. (Tr. 43–44.) That testimony, besides being evasive, was immediately contradicted by evidence that Habermehl, in an email dated August 9, 2017, notified Helfant that he "heard from Leah [Cochran] that a maintenance employee stopped by and told her he had an organizer come to his house last night . . . [and] [t]hey had a long talk and the organizer promised that the Union would buy them tools. . . ." (GC Exh. 4.) I therefore do not credit Habermehl's denial that he told the employees that bargaining would start from zero to the minimum.[17]

[12] The employees' wages were higher than minimum wage. (Tr. 55–56.)

[13] Rodolfo Rodriguez also served as translator for all but the first meeting. (Tr. 1223–1224.)

[14] Aguilar testified on cross-examination that he was certain that Habermehl said negotiations would start from zero or the minimum and that Respondent "could negotiate from "zero" to fifteen [dollars]." (Tr. 149–155.) I find that any assertion by Aguilar that the term "bargain from scratch" was used in that meeting is attributed to being an honest mistake because he did not testify in a way that conveyed a willingness to deceive or a desire to be dishonest.

[15] As mentioned above, when employees asked Habermehl why he was there to talk to them, he responded that he visited every year and that was the reason. (Tr. 62–63.) However, Habermehl admitted at trial that his stated reason was not true, and that he was in fact there in response to the Union's organizing drive. (Tr. 62–63.)

[16] Habermehl denied that he told employees that Respondent would start negotiations by proposing minimum wage, but that was contradicted by his sworn affidavit provided to the government during its investigation of the charges in this case, which reflects that he stated: "I said that the Union may start off by proposing a starting wage of $50 per hour and we my counter with minimum wage." (Tr. 55–57.)

[17] I further find that generally, in situations where the testimony from Respondent's witnesses conflicted with that from the General Counsel's witnesses, the General Counsel's witnesses were more credible and, for the most part, testified in convincing and forthright manners. I particularly find that Respondent witness Vicente Nunuz was unsure of himself when testifying, and I do not credit his denial that Habermehl said

Accordingly, I find that the credible evidence establishes that Habermehl, in at least one meeting with employees, stated that if the Union came in, negotiations would start at "zero to the minimum."

6. The Respondent's handout to employees titled "Boar's Head Brand" informed employees that if a union in voted in, negotiations will not start at current wages and benefits, but instead from zero or the minimum allowed by law.

Besides Habermehl's meeting with employees on August 21 and 22, the subject of negotiations and how they would work if the Union was selected by the employees as their bargaining representative was also addressed by the Respondent in a one-page document provided to employees on or about September 1, 2017, entitled "Boar's Head Brand." (Tr. 68, GC Exh. 6.) In that letter, the Respondent informed employees that negotiations would not start from what the employees currently had, but instead the negotiations would start at "zero or the minimum allowed by law. That particular statement read:

> If a union gets in, will negotiations start with what we already have? No. If a union is voted in, negotiations will not start at current wages and benefits. Nobody knows what the final outcome of the contract will be because each item is negotiated starting with zero or the minimum allowed by law. It could be more but it could be less. (GC Exh. 6.)

Shannon Van Noy testified that the "Boar's Head Brand" document was attached to the employees' paychecks, and that it was an accurate reflection of what Habermehl discussed in his meetings with employees.[18] (Tr. 854–856.)

7. Supervisor Guadalupe Rodriguez's interrogation and statements to employees on or about August 24, 2017.

The Respondent's description of how negotiations would work if the Union was selected by the employees was further addressed on or about August 24, 2017, in a conversation that Walter Aguilar had with his supervisor, Guadalupe Rodriguez, Jr. (Tr. 98–100, 119–120, 170–173, 901–907.) Aguilar testified that he was a strong union supporter, that he handed out union authorization cards in the lunchroom at work, and that he did not try to hide it. (Tr. 155–156, 249.) Aguilar testified that he was approached by Rodriguez while working on the line and Rodriguez asked him why he wanted the Union or what was the point of having a union. (Tr. 119–120, 170–174.) Aguilar told him that he wanted the Union to take off pressure, be appreciated, and that he wanted the Union to help bring change. (Tr. 170.) Rodriguez responded that the Union was "no good," that he had previously worked with a union and the union only represented people who did not want to work, and that the employees would "feel sorry about it." (Tr. 119–120, 170–173.) Aguilar testified that Rodriguez also told him that if the Union got in the Respondent would negotiate from zero to minimum. (Tr. 119–120.)

Rodriguez knew the Respondent did not want the Holland plant to be unionized and that Aguilar was a union supporter. (Tr. 98–100, 902.) Rodriguez admitted to having a conversation with Aguilar about the Union in late August after Habermehl's meetings, while they were on the production line. He also admitted the majority of the statements attributed to him by Aguilar. (Tr. 98–100, 901–906, 914.) In particular, he admitted that he started the conversation by asking Aguilar why he wanted or needed a union at the shop, and that Aguilar responded that the Respondent was short-staffed and needed employees. (Tr. 98–100, 901–906.) Rodriguez testified that he also told Aguilar that the employees could lose their bonuses and the company picnics. (Tr. 100, 905–906, 914.) Rodriguez, however, denied stating that negotiations would start from zero to minimum. (Tr. 906–907.)

Since Rodriguez' testimony differs from Aguilar's assertion that he stated negotiations would start from zero or minimum if the Union was chosen by the employees, I must make determinations on the credibility of these witnesses. As mentioned above, I found that Aguilar was a truthful and honest witness. He also testified consistently and convincingly regarding his conversation with Rodriguez. Rodriguez, while admitting most of the statements attributed to him, nevertheless denied stating that negotiations would be from zero to minimum. His denial in that regard was simply not credible or believable. When it came to denial of that statement, he also appeared uneasy and uncertain, and I find his denial in that regard to be unreliable. In addition, Rodriguez' statement about negotiations starting from zero is consistent with the information Respondent provided its employees in writing wherein it stated that "[i]f a Union is voted in, negotiations will not start at current wages and benefits . . ." and "each item is negotiated starting with zero or the minimum allowed by law." (GC Exh. 6.) Therefore, I find that Rodriguez told Aguilar that if the Union came in, negotiations would start from zero to minimum.

8. Plant Manager Bradley Rurka's mandatory meetings with employees on August 24, 2017, where he solicited employee complaints and indicated that he would try to get increased benefits for employees.

On August 24, 2017, just 2 days after Habermehl's meetings with employees and the same day that Aguilar was asked by his supervisor why he supported the Union, Plant Manager Rurka held at least three mandatory meetings with the hourly

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negotiations would start from zero or the minimum in the morning meeting on August 21. (Tr. 1120–1125.) He did mention, however, that Habermehl said bargaining would start at minimum wage. (Tr. 1124–1125.)

[18] In its post-hearing brief, the Respondent asserts that during Van Noy's testimony concerning the "Boar's Head Brand" exhibit (GC Exh. 6), she was "temporarily confused" about the "exhibit numbers" and that she "erroneously so testified" that the document was an accurate reflection of what Habermehl discussed in his meetings. (R. Br. p. 29.) That assertion, however, is not supported by the record evidence. Contrary to the Respondent's assertion, there is no evidence establishing that Van Noy was confused in any way about the exhibit or her testimony. In fact, she was shown the exhibit by Counsel for the General Counsel and acknowledged that it was given to employees in their paychecks. (Tr. 854.) She also clearly acknowledged that the document was an accurate reflection of what Habermehl told employees in his meetings where he used a Power Point. (Tr. 854.) It is also important to note that Respondent's contention is further belied by the fact that Van Noy never testified that she was in any way confused regarding her testimony, despite the fact that the Respondent had ample opportunity to elicit such testimony on her redirect examination. (Tr. 873–875.)

employees where he read a prepared statement titled "24-hour speech."[19] (Tr. 106–107, GC Exh. 9.)[20] Rurka does not speak Spanish, so those speeches were interpreted by Rodolfo Rodriguez and Leah Cochran.[21] (Tr. 104, 1071–1073.) Rurka testified that he read aloud the first two paragraphs of the statement, but since the employees in attendance spoke Spanish, the complete statement was read in Spanish to the employees.[22] (Tr. 106–107.) In the statement, Rurka informed the employees that the purpose of the meeting was to "follow-up" on the meetings held earlier in the week with the employees. (Tr. 106, GC Exh. 9.) He also testified that the purpose of the statement was to explain the changes that the Company was making.[23] (Tr. 107.) Rurka stated that in the meetings held earlier in the week, he heard employees' comments that the Respondent "doesn't feel like a family anymore." (GC Exh. 9, p. 4.) Rurka informed the employees that the "follow up meetings" were being held because the employees "deserve to know that we do listen to you." (GC Exh. 9, p.4.) Rurka told them that the Company had heard their concerns and would respond to their "concerns" in a way that would reinforce to employees that they were a "family."[24] (GC Exh. 9, p. 4.)

Rurka, making note of the employees' complaints that Respondent's vacation and attendance policies were unfair, announced that Respondent was "going to try something new" and change the vacation and attendance policies. (GC Exh. 9, pp. 4–5.) In regard to the attendance policy, Rurka stated that "[m]any of you told us that you felt it was unfair that we had increased the wait time for points falling off to 60 days" and "[a]s we told you earlier this week, we heard you and we have already changed it back to 30 days." (GC Exh. 9, p. 4.) In addition, Rurka stated that "after listening to you, we are adding to the list [of excused absences] . . . court appearances, any meetings or events related to immigration issues and we are expanding the list of medical visits to include all medical visits, not just the preventive." (GC Exh. 9, p. 4.) Rurka announced that Respondent was also going to change the vacation policy to: (1) allow employees to use vacation days in lieu of getting attendance points for an absence; (2) provide that if employees miss the day before or after a holiday because of a documented injury or illness, they will still receive holiday pay; and (3) allow employees to use vacation time in 4 hour increments instead of full 8 hour increments. (GC Exh. 9, pp. 5 and 6.)

In that meeting, Rurka also announced changes to the lock out/tag out policy that employees believed was unfair, by classifying violations where it was not entirely the employee's fault, as "minor violations." (GC Exh. 9, p. 5.) In addition, he announced changes to the policy pertaining to equipment and PPE by stating that the Company will purchase all of the PPE for the employees, including boots and safety glasses. Those issues, as discussed above, were two issues that had been raised by the maintenance employees as the reasons for considering the Union as their collective-bargaining representative. (GC Exh. 4 and GC Exh. 9, p.5.)

Rurka also informed the employees that the items the Respondent was changing was "a good step toward bringing out family back together."[25] (GC Exh. 9, p. 7.) After informing the employees that their complaints would likely be remedied, Rurka asked them to keep "communicating" with management about their concerns so that they could be addressed and, if possible, remedied. In fact, Rurka told the employees that the Respondent could not fix the things it did not know about, explaining that "[w]hile a couple of these issues have been raised before, many of the things you listed had never been brought to our attention before." (GC Exh. 9, p. 6.) In order to do that, Rurka told the employees that Respondent was "bringing back the Suggestion Box," and he committed to the employees that every single comment in the suggestion box would be considered and that management would report back to employees on what concerns could be remedied and which ones could not. (GC Exh. 9, pp. 6–7.)

9. The mandatory meetings held by Senior Vice President of Operations Larry Helfant on or about August 29, 2017, where he solicited employee complaints and indicated he would try to get an increase in benefits for employees.

The Respondent's commitment to consider and remedy employee complaints and concerns was further expressed to employees a few days later. On August 29, 2017, Helfant traveled from the corporate headquarters to Holland to hold three mandatory meetings for the hourly employees to get "general feedback" about "anything." (Tr. 447, 1619, 1637.) His recall of what he said at the meetings was limited. He testified, however, that he scheduled and held the meetings to "listen," and that the main two concerns the employees had were the vacation and attendance policies. (Tr. 1620, 1637, 1639.) He also recalled that a main concern of the maintenance employees was to have Respondent provide and pay for their work tools. (Tr. 1640–1641.)

Several employees had better recollection of the meetings and what Helfant told them. They confirmed that Helfant informed them that he was there to hear and try to address their complaints, and that the two main issues for the employees were the vacation and attendance policies. (Tr. 269, 1162, 1246.) Employee Apolonia Rios testified that Helfant told employees that he was there to address the complaints of the workers because he "[heard] about the rumors" that the employees "wanted more benefits,"

[19] While Rurka testified that he held three meetings, Rodolfo Rodriguez testified that he recalled there being four meetings. (Tr. 1235–1240.)

[20] The record does not reflect the reason Respondent's speech or statement was entitled "24-hour speech."

[21] Rodolfo Rodriguez testified that he translated the script from Rurka's speech verbatim. (Tr. 1235–1240.)

[22] Leah Cochran's recollection of Rurka's meeting varied in respect to the fact that she recalled that Rurka read the complete statement in English, and she then read the complete statement in Spanish. (Tr. 1071–1073.)

[23] Shannon Van Noy, who attended two of the three meetings held by Rurka, testified that the purpose of the meetings was to let employees know about changes in policy made by the Respondent. (Tr. 800–801.)

[24] Employee Jorge Torres testified that in that meeting, Rurka informed the employees that he was going to listen to their complaints. (Tr. 1187–1188, 1199.)

[25] Maintenance employee Rodney Valenzuela testified that Rurka told the employees that it had come to their attention that the employees did not like what was going on in the Company and they were going to make changes. (Tr. 360.) He also testified that Rurka told them he wanted the employees' feedback to "bring the family back together." (Tr. 360.)

and "he would address the complaints that the workers had at the time." (Tr. 396–397.) Employee Ascension Rio also testified that Helfant said he was aware of the problems at the plant and that he would like to "solve" the problems the employees had. (Tr. 270.) Likewise, maintenance employee Rodney Valenzuela testified that Helfant specifically asked the employees how Respondent could "help us out in maintenance . . . with providing us with tools . . .," he asked what the employees "find the Company [is] at fault for," and he inquired about the employees' opinions concerning the Company's policies. (Tr. 365–367.)

In addition, Respondent witness Abigail Forsten testified that Helfant asked employees for input to improve things at the facility and he told them he was aware of employee complaints that it was unfair to wait 3 months for attendance points to fall off. (Tr. 1173–1174.) She also testified that Helfant told employees that he would look into the issues presented and the changes the employees requested during that meeting. (Tr. 1175–1176.) In addition, Helfant told the employees that he would look into what the Company could do better for newer employees going forward. (Tr. 1173–1176.) Respondent witness Jorge Torres, who testified that he did not recall Helfant ever coming to the Holland plant to talk to the employees before, stated that Helfant told the employees that he was there to listen to their concerns, complaints, and problems and to "try to help." (Tr. 1190–1191, 1202–1203.)[26]

10. The Respondent increased benefits for Union Supporter and employee Apolonia Rios by raising her wages and paying retroactive backpay on or about October 2, 2017.

Employee Apolonia Rios and her husband, Ascension Rios, where supporters of the Union whose photographs were featured on the Union's Facebook page. (GC Exh. 11.) In February 2017, Apolonia Rios held the position of "Lead" in the Browning Department. (GC Exh. 12.) She held that position for approximately 10 years and she reported to Supervisor Jim Monroe. (Tr. 433–435.)

On February 10, 2017, Van Noy, Supervisor Monroe, and the human resources staff "addressed several performance issues with her" and she was started on a Performance Improvement Plan (PIP) (Tr. 439, GC Exh. 16), where it was explained to her that for her to remain as a Lead, she had to "improve her performance in all areas outlined." (GC Exh. 12.) On March 7, 2017, months prior to the Union's organizing campaign, Rios was informed that she had failed to report an incident of physical contact between two employees, thereby putting the employee, her coworkers, and the Company at risk. (GC Exh. 12.) In a Notice of Demotion issued by Van Noy and Monroe on March 7, 2017, Rios was informed that she was being demoted for performance issues after she was unsuccessful in complying with her performance improvement plan. (Tr. 400–404, GC Exh. 12.) Van Noy, who was personally involved in Rios' demotion, testified that the Respondent was unhappy with her performance and her demotion was well thought out and not issued lightly. (Tr. 696–697, 702–703.) Rios was removed from her position as Lead and was moved to a "general labor position." Pursuant to that demotion, Rios had her pay reduced from $16.45 to $14.15 per hour. (GC Exhs. 12, 16–18.) Rios testified that when she was issued her demotion, she informed management that she believed it was unjust and she demanded an investigation, and she made a handwritten notation to that effect on the bottom of her Notice of Demotion. (GC Exh.12.) She testified, however, that she was unsure if any investigation was ever done, and the record does not reflect any investigation of her claims prior to the Union's organizing campaign. (Tr. 470–472, 693–695.)

Immediately after Helfant's meeting where he told employees that he was there to listen to their complaints and attempt to remedy them, Apolonia Rios approached him and through an employee who could translate, Rios told Helfant that she had been demoted in March 2017 and that her pay was decreased by approximately $3 an hour. She stated that she did not feel her demotion was "just" and that it had a negative impact on her. (Tr. 401, 1647.) Helfant told her that he would look into it for her and talk to the manager and human resources. (Tr. 401–401, 447–448, 1648–1649.)

Following Rio's conversation, Helfant instructed the human resources department to reconsider Rios' demotion and investigate her complaint. (Tr. 1627–1628.) Van Noy testified that after holding his meeting with the employees, Helfant told her that Rios was upset with her demotion and reduction in pay, and he asked her if she could do anything about it. (Tr. 699, 724–725.) According to Van Noy, Helfant informed her that he was "concerned about the fairness of the long-term employee's treatment" and that he "want[ed] us to take that into consideration and he asked me to look into it." (Tr. 702.) Shortly after Helfant's request, Rios was summoned to the human resources office where Cochran informed her that Helfant had directed her to reinvestigate the circumstances of her demotion. (Tr. 402–404.) It is undisputed that approximately 2 weeks after that, (on or about September 11) she was called to human resources where Rurka, Van Noy, and Cochran informed her that she had been given a new position and wage rate. (Tr. 448.) However, there was no change in Rios' job duties and she performed the same work that she was performing as a general laborer. (Tr. 430, 701, 860.) The Respondent also increased Rios' wages from $14.15 to $15.90 per hour and issued her a lump sum payment for the difference between the wage rate she had prior to her demotion in March and the increased rate she just received in September. (Tr. 404–405, 429–432, 449–450.) Rios estimated that the lump sum payment was around $1600 to $2000. (Tr. 430, 449–450, 701.)[27]

11. The Respondent increased benefits for Union supporter and employee Nelson Langarita by providing him a different position and raising his wages on or about August 28, 2017.

During this time, employee Nelson Langarita, who was also a

[26] Human resources employee Rodolfo Rodriguez recalled that Helfant said he was there to listen to any questions or concerns mentioned in the meeting that Respondent did not want to "compromise" or "create any issues . . . while employees are talking about the Union." (Tr. 1304–1305.)

[27] The record reveals that Apolonia Rios subsequently had her employment with Respondent end after she accumulated too many attendance points. (Tr. 450–451.)

known union supporter, was similarly granted a pay increase.[28] (Tr. 706–707.) It is undisputed that Respondent had knowledge of Langarita's support for the Union.[29] (Tr. 708–709.) Shortly after Habermehl's meeting where Langarita asked about Union benefits at Respondent's unionized Virginia plant, Langarita told Human Resources representative Yaritza Berrios that he believed he deserved more pay for his job. (Tr. 1015.) Van Noy testified that when she returned from leave on or about August 21, 2017, Berrios brought to her attention that Langarita told her that he was not being compensated for additional duties that he was performing. (Tr. 706–707.) Specifically, Langarita brought to the attention of human resources that he was performing data entry work instead of just being a machine operator or packer. (Tr. 706–707.) Berrios testified that she found out that, as he alleged, he was performing the duties of a packaging specialist where he was entering information in the computer and printing labels in order to keep the flow of the trays of meat going into the production area. (Tr. 1014.) Upon looking into Langarita's claims, Van Noy checked with RTE Department Manager Urasinski who confirmed that Langarita was in fact given extra work responsibilities beyond his job classification. (Tr. 708.) Thus, Van Noy likewise testified that it came to her attention that Langarita was responsible for keeping logs and entering batch numbers in the computer. (Tr. 707.)

Based on her investigation, on or about August 28, 2017, Van Noy changed Langarita's job classification from "general Employee" to "packing specialist," and adjusted his pay to that of a packing specialist, which increased from $14.15 to $15.40 per hour. (Tr. 708–709, 1012–1015, GC Exh. 21.) Respondent's records reflect that his job title and new pay rate were effective on or about September 26, 2017. (GC Exh. 21.) According to Van Noy, that adjustment was not unusual, and in fact, there were already two packaging specialists, with Langarita becoming the third such specialist. (Tr. 709.) Berrios testified that even though that position did not exist in Langarita's department, it was a position that existed in other departments at the Holland facility. (Tr. 1014.)

12. The Respondent's suspension and discipline issued to Union supporter and employee Walter Aguilar on August 25 and 31, 2017, respectively.

On or about August 25, 2017, Aguilar, a known union supporter with no history of discipline, was alleged to have been telling employees to take it easy or slow down. (Tr. 124, 156, 675.) He worked on the on the "boxing line" where cooked and packaged meat was placed in boxes for shipment. (Tr. 910.)

Aguilar's comments were reported by an employee to Supervisor Leticia Estrada, who reported it to RTE Manager Judy Urasinski, who then reported it to Leah Cochran. (Tr. 1044.) Cochran then reported the statement to Van Noy, who determined it was a serious situation, and contacted Habermehl to inform him about the reports that Aguilar was restricting his own production or interfering with the production of others. (Tr. 670–671, 669, 1044–1045, R. Exh. 5.) Van Noy testified that she knew that Aguilar was a Union supporter, and she told Habermehl about his union support because she was concerned about discipling a Union supporter.[30] (Tr. 672–673, 816.) Habermehl told her to treat the situation as she would any other (Tr. 673, 814), and at that time, they decided to conduct an investigation. (Tr. 670–674, 1047, 1102–1103.)

In Respondent's investigation Van Noy and Cochran initially spoke with Aguilar, with Cochran translating. (Tr. 1046–1047.) Aguilar denied telling employees to slow down in their work, but he subsequently admitted saying that he did not feel that he should have to do the work of two people. (Tr. 810–811, 1052, R. Exh. 5.) Based on that meeting, Van Noy and Cochran decided to suspend Aguilar pending an investigation. (Tr. 674, 1054.) The reason management decided to suspend Aguilar pending investigation was because they believed they could have a "clean investigation" without any worry of having Aguilar on site possibly trying to talk to the witnesses about it and without worry of him influencing what the witnesses had to say about the situation. (Tr. 864.)

Aguilar testified that he told employees to "work easy," because there was a lot of "pressure" and there were a lot of employees being injured. (Tr. 124, 134.) He acknowledged, however, that the line on which he worked was fully staffed (Tr. 135). On cross-examination Aguilar admitted that he told employees to "take it easy" (Tr. 157–159), and he acknowledged that even though he thought there were not enough employees working on the production line, he never complained to management about it and he never filed any safety concerns. (Tr. 909, 1222–1223.) According to Aguilar, the purpose in making his statements was "that they not work as fast in order for them not to injure themselves." (Tr. 249, 816.) There is no evidence that any employee stopped working or that production was affected by Aguilar's statement. There is also no evidence that any employees were injured due to pace or speed off the boxing production line where Aguilar worked, or that the pace of the work in the Boxing area was so fast that employees were routinely injured. (Tr. 817, 909, 1218–1219, 1222–1223.)

In interviews conducted by Cochran and as noted in reports taken from those interviews, employees reported that Aguilar asked them why they were hurrying, he was mocking another employee and telling him not to work so hard and that he should relax, and that he was always telling employees not to work so hard. (Tr. 1055–1057.)[31] Another employee reported that

[28] Langarita was subpoenaed to appear and testify at both sessions of hearing in this matter. However, he failed to respond or comply with the subpoena and appear as directed. (Tr. 763, GC Exh. 20.)

[29] Van Noy testified that the Respondent was aware of Langarita's Union support. In particular, she saw Langarita speaking out in favor of the Union at Habermehl's meeting in August, and she saw him handing out Union flyers in the Company parking lot in October. (Tr. 708–709, 773.)

[30] Cochran likewise testified that she and Van Noy consulted with corporate human resources because they knew Aguilar was a Union supporter and knew that disciplining him would be under some scrutiny, and they wanted to make sure the investigation was clean and fair. (Tr. 1105.) Cochran also testified that she had consulted with Habermehl on other instances of employee discipline when they involved "sensitive situations," such as lock out/tag out violations. (Tr. 1107–1108.)

[31] Van Noy testified that the investigation revealed there were other employees who were laughing and mocking others about working so

Aguilar told one employee to hurry up and then said that the harder she worked, Respondent would only pressure her to work harder. (R. Exh. 5.) One employee reported to management that Aguilar had told him not to work so hard. (Tr. 681–682.)

The Respondent's investigation was completed in 1 day. Cochran testified that management's understanding from the employees interviewed was that on many occasions, Aguilar told people to slow down their work. (Tr. 1058–1059.) After Aguilar served his 3-day suspension, upon his return to work on August 31, he was informed that his suspension was rescinded, but that he was still going to receive a written warning for attempting to cause a work slowdown. (GC Exh. 10.) Cochran testified that Aguilar was disciplined because he had encouraged employees to slow down in the past as well as what was reported at that time, and that they needed to follow progressive discipline. (Tr. 1062.)

Aguilar's written warning states that "[d]uring the investigation it was reported that you made statements to multiple individuals encouraging them to not work so fast or too hard." (Exh. 10.) The written warning stated that Aguilar was in violation of Company Work Rule 2.23—"Restricting own production or interfering with production of other employees." (GC Exh. 10.) Van Noy testified that she and Rurka recommended that Aguilar be issued a written warning and Habermehl agreed. (Tr. 685–686.) There is no evidence that any employees had previously been disciplined for the same offense. (Tr. 863.) Van Noy testified that even though the investigation was completed in 1 day, Aguilar remained on administrative suspension for the following 2 days because she needed to speak with the supervisor and plant manager as a team. (Tr. 866–868.)[32] The Respondent never issued Aguilar an official suspension since his suspension was an administrative suspension pending investigation, and it subsequently paid him for the days he was off work pending the investigation. (Tr. 1079.)

13. In late September 2017, Larry Helfant held a second meeting for employees and indicated that Respondent would change its vacation and attendance policies to benefit the employees.

Two weeks after Helfant conducted meetings with employees where he solicited their complaints and informed them that he would do what he could do to remedy them, he traveled to the Holland facility again for the sole purpose of informing the employees that the vacation and attendance policies were being updated and improved. (Tr. 709–710, 1163–1164, 1177, 1305, 1397, 1404.) Van Noy testified that Helfant did not normally come to the Holland facility to announce changes in policy like the instant changes. (Tr. 710.)

Respondent witness Abigail Forsten testified that in Helfant's September meeting with employees in the facility cafeteria, he told employees that the Company was making changes to policies, such as the vacation and attendance policies, and that those changes were improvements over what the existing policies. (Tr. 1176–1177.) In these meetings, which included maintenance employees, Helfant also announced that the Company was changing its policy to purchase tools, at no cost to employees, for all maintenance department employees.[33] (Tr. 366.)

About a week after Helfant's September meetings, the employees received a handout with their paychecks explaining the changes in more detail. (Tr. 665, 1177.) The changes announced by Helfant were summarized in that one-page handout titled "Explanation of Changes to Policies." (GC Exh. 7.) That document explained the specific changes to employee working conditions, such as: (1) allowing attendance points to drop off after 30 days instead of the current 60 days timeframe;[34] (2) allowing employees to take pre-scheduled vacation time for medical appointments; (3) allowing absences to be taken for additional life events to be excused without the accrual of an attendance point; (4) allowing employees the right to use vacation time for a call off, up to five times a year; (5) using vacation time in 4 hour increments (where previously it had to be used in "full day increments") (Tr. 720–721); and (6) other changes to the wellness program, holiday pay, the lock out/tag out procedure, and personal protective equipment for the employees. (GC Exh. 7, Tr. 1177.) That document also announced the creation of another suggestion box for employees, and it encouraged them to use it. (GC Exh. 7.)[35]

The vacation policy, which had been one of the major sources

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hard, but that joking is not a violation of the rules. (Tr. 814.) Cochran also stated that Aguilar was accused of telling employees to slow down their work, which was different that not wanting to work and mocking people who do. (Tr. 1094.)

[32] Cochran testified that suspensions pending investigation of 3-days duration were not uncommon for the Respondent's operation. (Tr. 1081.)

[33] Respondent witness Jorge Torres also testified that in Helfant's second meeting, which was about 2 weeks from his first meeting, he announced changes to the Attendance and Vacation policies, and some of the working conditions that were changed were things employees had complained about previously. (Tr. 1204.) Respondent witness Gabriela Esquidel also testified that Helfant talked about changes to the vacation and attendance policies. (Tr. 1397.)

[34] The Respondent reverted back to its old policy that existed 3 years prior, when it had a 30 day drop off. (Tr. 666.)

[35] That document stated in its entirely as follows:

Attendance Policy

- 1 attendance point falls off after 30 days of perfect attendance.
- Employees working overtime may, with advance notice, leave early for a pre-scheduled medical visit without receiving points.
- With supporting documentation, the following events are excused absences:

  Funeral leave & Jury duty
  School conferences for child
  Court appearances (civil or immigration)
  Vacation days
  Any medical visit for your own treatment
  Personal leave, Military leave, and Family & Medical Leave (FMLA)
- At the time of call in, an employee may notify the company they are not coming in that day and want to use a vacation day. They will not be assessed any points. This cannot be done on the day before or after a holiday.

Holiday Pay

- Employees absent on the day before or after a holiday who provide documentation of their own injury or illness on that day, will still receive holiday pay.

Wellness Program

- The company wants employees to get the discount. Employees

of employees' complaints for several years as reflected in the Respondent's mandatory meetings for employees in August and September of 2017, was changed and expanded to benefit the employees. Newer employees were given 5 days of vacation and senior employees received 2 more days of leave, and under some circumstances, leave was allowed without prior approval. (Tr. 400, 710, 720.) The policy for PPE for maintenance employees was also changed, and as a follow up to that change, Maintenance Manager Guy Yondo took orders from the maintenance employees with regard to their choice of tool brands. (Tr. 370.)

The Respondent's changes in policy and working conditions for employees discussed above and which were listed on the "Explanation of Changes to Policy" handout to employees, plus several more changes, were approved by the Respondent in the first week of September and they were implemented on October 1, 2017. (Tr. 1578, 1580, GC Exh. 7, GC Exh. 22.)

14. In or about October 2017, Supervisor Maria Mendoza's interrogation and statements to employees regarding the loss of benefits if they selected the Union, and that if they were terminated, the Union would not be able to get them reinstated.

While the Respondent's employees were receiving unexpected benefits, the record reflects that some of Respondent's management officials were confronting and questioning individual Union supporters regarding their support for the Union.

Elba Rivas, an employee in the Beef Trim Department, was supervised by Maria Mendoza.[36] (Tr. 86–87.) Rivas testified that around the time that she saw employees handbilling out in the Company parking lot in October 2017, Mendoza approached her on the line around the middle of her shift and when everyone was on the line working and asked her and other nearby employees on the line if they "would like to have the Union," and in general she asked "are you agreeing with the Union?" (Tr. 87–88, 92.) Rivas recalled that some employees responded, such as Martina Ramirez, who said she was not supporting the Union, and Jose Villalobos, who told Ramirez something to the effect that "Okay, you are one of mine." (Tr. 88–89.) According to Rivas, Mendoza said that if the Union came in the Company will take away the 7 minutes they had to go up to and down from the cafeteria. (Tr. 89.) The time allowed for employees to put on and take off their work clothes is referred to as "donning and doffing" time. (Tr. 973–974.) Such time allows employees 7 minutes to go from their work area to the cafeteria and then back to their work areas and put on protective gear and start work. (Tr. 973–974.) In addition, Rivas testified that Mendoza said the Company will take away their bonuses.[37]

Mendoza denied, through leading questions from Respondent's counsel, all the questions and statements attributed to her by Rivas. (Tr. 964–967, 970–976.) She also denied having any conversations with or making any statements on the line to Ramirez or Villalobos. (Tr. 967, 973.) According to Mendoza, there are two lines in the beef trim area of the plant where she is a supervisor. (Tr. 958–959.) On each line, there are seven employees on each side of a belt that is approximately 7 feet in width and on which the product travels. (Tr. 959–961.) The employees on those lines stand side-by-side, just 2 feet apart. Besides denying interrogating or making statements to employees concerning the Union, Mendoza testified that she generally did not hold meetings with employees on the lines when they were running because it is noisy and they have to concentrate on cutting the meat and it would be dangerous to distract them. (Tr. 966.) However, she did acknowledge that she spends approximately 2 hours a day in the beef trim area, and as part of her duties, she checks on the Beef Trim line employees two times a day for approximately 10 minutes each to personally observe how they are doing. (Tr. 999–1000.) She also acknowledged that even when the line is running, she is able to briefly speak with employees. (Tr. 999–1000.)

With regard to Rivas' assertion that Ramirez and Villalobos were on the line when Mendoza interrogated them and made statements about the Union, and that they both responded to Mendoza, Ramirez did not testify to deny that she was present or that she responded to Mendoza's questions. However, Villalobos, who worked on the same line and shift as Rivas and Ramirez, was called by the Respondent to testify and he denied ever seeing or speaking to Mendoza on the beef trim line. (Tr. 928–931.) While he testified that Mendoza did not usually hold meetings with employees on the line when it was running because it was noisy and they had to concentrate on their work, he did acknowledge that it was possible to communicate with others on the line when it was running. (Tr. 932–939.) He likewise acknowledged that Rivas worked directly next to him every day on the line. (Tr. 943.)

With regard to Mendoza's statements to employees concerning the Union, Ascension Rios also testified that several weeks after the meeting held by Helfant, when he was in his work area in the Beef Trim Department filling out paperwork, Mendoza approached him and asked him if he supported the Union, and that

should visit HR for help completing the health assessment. It will save you money.

Lock Out/Tag Out (LOTO)

- The company has two levels of LOTO violations. A Major violation occurs when an employee just received training on LOTO and fails to follow it or intentionally violates LOTO. A Major violation is automatic termination. A Minor violation occurs when there is some evidence that it was not entirely the employee's fault. A Minor violation is judged on a case-by-case basis.

Personal Protective Equipment (PPE)

- The company is in the process of determining whether other plants provide more PPE to their employees at no cost. If true, changes will be made so Holland employees are treated the same.

Vacation Policy

- Employees may now use Vacation in 4 hour increments.

Suggestion Box

- The box in the hall by Accounts Payable is now a Suggestion Box. Use it. (GC Exh. 7.)

[36] The record reflects that Maria Mendoza's name was previously Maria De Leon. (Tr. 271.)

[37] The record reflects that the Respondent paid hourly employees bonuses on occasion, such as in March, when employees receive the same amounts, and at the end of the year, when employees receive bonuses that are calculated on how long the employee worked for the Respondent. (Tr. 711.)

if he did, he would be noticed by the Company and that he could "end up in court." (Tr. 271–274.) With regard to her comment that he was going to end up in court, he explained that Mendoza said that if the Union came in and the employees were at fault for something, the Company could fire them and they "could be taken to court" by the Company.[38] (Tr. 285–286.) Rios told her that he supported the Union even with such risks, by stating that he was "asking to get the Union." (Tr. 272.) Mendoza told him that the situation in New York with the Union was "not good." (Tr. 272.) Mendoza denied telling any employees that if the Union came it, it would be futile or that the Union would not be able to get them reinstated if they were discharged (Tr. 975).

Since the testimonies of Elba Rivas and Ascension Rio differ from that of Mendoza and Villalobos, credibility determinations are required. I find that Rivas and Ascension Rios were truthful in their testimony and honest in their demeanor. They were convincing regarding their conversations with Mendoza and showed good recall concerning what she said in those conversations. In addition, Rios and Rivas were current employees at the time of their testimonies, which tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, supra; *Shop Rite Supermarket*, supra.

Mendoza's testimony and her denials, on the other hand, were simply not credible or believable. I found her to be an unreliable witness, as her testimony at times was inconsistent[39] and her recollection lacking.[40] Much of Mendoza's testimony was also elicited with leading questions during direct examination. Such testimony is entitled to, and should be afforded, less weight that the testimony of the General Counsel's witnesses and discredited where appropriate. *T.M.I.*, 306 NLRB 499 (1992); see also *H.C. Thomson*, 230 NLRB 808 (1977). Villalobos' demeanor and testimony also lacked credibility. He was inconsistent in his testimony,[41] at times was evasive,[42] and he provided overly certain and conclusory testimony that made his testimony seem insincere and not believable. On that basis, I discredit the testimony of Mendoza and Villalobos where it conflicts with that of Rivas and Ascension Rios. In addition, I find that even though some Respondent witnesses testified that they believed it was not possible to conduct meetings while the production line was operating due to the fact that noise was made by horns and the overhead unit, I provide those assertions little, if any, weight due to the fact that those witnesses acknowledged that it was nevertheless possible to have conversations with employees on the production line when it was running.[43]

Thus, I find that in October 2017, Mendoza approached employees working on the line and asked if they "would like to have the Union," and whether they were "agreeing with the Union?" Mendoza also said that if the Union came in the Company will take away the 7 minutes for donning and doffing their safety and PPE gear going to and coming back from work breaks that the Company provided employees,[44] and that the Company will take away the employees' bonuses if the Union came in. In addition, on or about December 6, 2017, Mendoza asked Ascension Rios if he supported the Union, and she stated that, if he did, he would be noticed by the Company. She also told Rios that if the Union came in and the employees were at fault for something, the Company could fire them and they "could be taken to court" by the Company.

15. On or about October 11, 18, 25, and November 16, 2017, Respondent's security guards allegedly engaged in surveillance and/or created the impression of surveillance of employees' union activities.

On four dates, October 11, 18, 25, and November 16, 2017, the Union organizers distributed Union literature in the form of handbills or flyers in the street adjacent to the Holland facility. Several of Respondent's employees were provided the flyers and they distributed them in the parking lot to other employees. The Respondent's employee parking lot is next to the facility and it has two entrances and one exit, which are all one-way. (GC Exh. 13.) Adjacent to the parking lot is Respondent's security gate house or "guard shack" that serves as the main entrance to the facility and which is normally manned by two security officers who routinely monitor the lot by closed circuit television (CCTV) and by patrol on foot. (Tr. 250, 1353.) Normally, with regard to periodic patrols, one guard stays in the guard shack and the other patrols the parking lot and the rest of the property.[45] (Tr. 1353.) The guards are supervised by Ronald Ortega, whose

[38] Mendoza's statement about "end[ing] up in court" or "be[ing] taken to court" appear to be some kind of reference to the NLRB charges, but it was not explicit in the record.

[39] Mendoza testified that the Union campaign was a "big deal," and she spoke to employee Raul Morales about the Union when they were near the Beef Trim line when it was running (Tr. 994–996), but she also stated in her sworn affidavit to the government during the investigation of the instant case, that she never spoke to any employees about the Union. (Tr. 997.)

[40] Mendoza acknowledged that her recollection was suspect, stating that she was "not good at remembering." (Tr. 1005.)

[41] In this connection, Villalobos denied that anyone ever spoke to him about the Union, explicitly stating "Never, never" in response to that question. (Tr. 943–947.) However, he then admitted that employees were in fact talking about the Union, specifically asking if the employees wanted the Union, as some answering that they did want it, and some stating that they did not want the Union. (Tr. 944–945.) He also admitted that he actually participated in a conversation about the Union by stating that he had been with the Company for 17 years and he "was fine" and didn't need anything." (Tr. 944–945.)

[42] I found his testimony was evasive when being questioned about whether he ever attended any meetings held by the Company where they discussed the Union (Tr. 947–949.)

[43] Mendoza admitted that she was able to briefly speak to employees working on the line and when the line was running. (Tr. 999–1000.) Villalobos also acknowledged that it was possible to communicate with other employees on the line when it was running. (Tr. 932–939.) While Respondent witness Mark Emmons testified that he did not believe it was possible to conduct a meeting while the production line was running due to the noise, he did acknowledge that it was possible for Mendoza to speak to employees when they were on a break on the line. (Tr. 888–890, 896.)

[44] The record reflects that employees were allowed 20-minute breaks and a total of 14 minutes for donning and doffing. (Tr. 1221–1222.)

[45] Human resources employee Rodolfo Rodriguez testified that normally one guard is stationed in the guard shack where he or she watches the CCTV monitor that has a view of the parking lot and its entrance and exit. (Tr. 1271.)

workstation is located in an office inside the facility and he does not normally perform day-to-day security patrols or CCTV monitoring. (Tr. 1467–1468.)

On October 11, Union Organizer Francisco Castillo and two other organizers stationed themselves around 1:00 p.m. on the street adjacent to the parking lot, which was a public right of way. Respondent Security Officer Gerald Cox saw the organizers and immediately notified Ortega, who came to the guard shack.[46] Cox and Security Officer Doll approached the Union organizers on the street and informed them that they could not be on the Respondent's property. (Tr. 488, 1424, 1346.) Organizer Castillo told the security officers that he knew he was not allowed on the property and he had no intention of entering the parking lot. (Tr. 488.) There were only a few employees coming and going from the lot at that time, and while some of the guards returned to the shack, others remained in the lot and encouraged the employees in their cars to keep moving past the Union organizers. (Tr. 488.)

At the time of the shift change, between 2:30 and 4:00 p.m., several employees, including Walter Aguilar, Apolonia Rios, Tomasa Garcia, Norma Chacon, Olivia Trejo, Sanjuana Garza, and Nelson Langarita went as a group and got Union flyers from one of the Union organizers, and they handed them out to employees in the Company parking lot. (Tr. 126–128, 179–180.) Some vehicles stopped to take the literature as them were coming or leaving from work, and other employees continued to drive by without stopping to take a flyer. (Tr. 492, 1350.) During the shift change, traffic was backing up and the guards who were in the lot told the cars to keep moving. (Tr. 1350–1352.) At that time, at least two, and at one time four security guards were in the parking lot near the employees who were handing out Union literature. (Tr. 303, 422, 489, 1352.) The employees who testified all indicated that the security guards followed them while they were handing out the Union flyers.[47]

The human resources department was notified by security and told about the presence of the Union organizers. Van Noy came to the parking lot with Assistant Plant Manager Mark Emmons and HR Specialist Rodolfo Rodriguez to join the security personnel. That group of employees approached the Union organizers and employees who were by the exit of the parking lot. (Tr. 772.) Van Noy and the security personnel spoke briefly to Castillo in English, telling him that he was not allowed on the property, and Castillo indicated that he understood and that the employees had the right to handbill in the parking lot, pointing to the solicitation policy posted by Respondent outside the parking lot by the exit to the street. (Tr. 496–497, 1348.) Van Noy acknowledged that when the handbilling was taking place in the parking lot, she and other human resources personnel and the security guards went outside, where she saw employees with handbills organizing. (Tr. 770–772.)[48]

Security Officer Gerald Cox testified that during the handbilling that occurred on October 11, he went out to the parking lot because cars were slowing down or stopping to receive Union flyers that were being handed out. It is undisputed that during the time of the shift change, traffic in the parking lot was backed up. Cox and the other security officers and security supervisor went out to maintain a safe environment and to keep traffic moving during the shift change that started at 2:30 p.m. (Tr. 1346–1352.) The guards told the cars to keep moving, using hand motions meant to keep the traffic flowing. (Tr. 1472–1473.) While out in the parking lot tending to the traffic backup, they observed employees handing out Union flyers. (Tr. 1369.) It is undisputed that Ortega and the security detail remained in the parking lot the entire time that the employees were attempting to distribute their Union literature, and they were watching employees engaged in that activity and they were encouraging other employees in their vehicles to keep moving. (Tr. 128, 459, 488–490, 1350, 1377, 1439, 1445.) While Van Noy, Rodriguez, and Emmons returned to the facility, Ortega remained in the parking lot for two and a half hours that day observing the employees handbilling and the Union organizers. (Tr. 1428.) Ortega testified that on October 11, even after the traffic stopped being backed up, he still stood in the parking lot "observing," and he noticed when employees took flyers and when they did not. (Tr. 1475–1477, 1480, GC Exh. 14, p. 3.)

When the Union organizers returned to the facility on October 18, 25, and November 16, 2017, to distribute flyers at the same location on the street, employees handing out flyers in the Company parking lot were again joined by various security guards and personnel who continued to patrol the lot, observe the employees, and direct vehicles to keep moving past the organizers. (Tr. 510–514.) One significant difference from the October 11 handbilling, however, was that during the employee handbilling that occurred on October 18, 25, and November 16, there were no significant traffic backups that prevented cars from safely exiting the lot. (Tr. 1445–1446.) In that connection, when Ortega was asked at trial if there was any backup of cars on October 18, 25, and November 16, in terms of them being unable to get out of the parking lot, he testified that "it wasn't bad." (Tr. 1445.) Despite the lack of significant traffic backups or problems on October 18, 25, and November 16, Cox and the other security personnel nevertheless went out to the parking lot on those days to "observe what was going on" and at times they were in close

[46] Respondent's internal email shows that Ortega was informed by Habermehl to expect Union organizing activities on that date. In that email, Habermehl stated that Respondent should "keep the union organizers off or our property and call the police if they block traffic or disrupt the flow of employees, vendors, [or] inbound/outbound trucks." (GC Exh. 29.)

[47] Aguilar testified that the security guards followed them around the parking lot while they were passing out the flyers. (Tr. 198.) According to Apolonia Rios, when she and other employees were passing out flyers for the Union to employees in the parking lot on October 11, security guards were out in the lot and they were watching her and the others handing out flyers. (Tr. 456–459.) In addition, Union Organizer Francisco Castillo testified that he saw the security guards watching the employees handbilling, and at one point he saw two guards walking behind and following the handbillers.[47] (Tr. 510–512, 631.) Norma Chacon testified that when she was handing out Union flyers in the parking lot, the security guards were walking toward her and watching her. (Tr. 303, 321.)

[48] Rodolfo Rodriguez testified that on October 11, he saw employees in the parking lot handbilling and he went back to the guard shack and watch the activities in the parking lot on the monitor. (Tr. 1271.)

proximity to the employees handbilling.[49] (Tr. 1359–1360, 1362–1366, 1381–1384, 1445–1446.) In particular, Cox testified that during the employee handbilling that occurred on October 25 and November 16, he went out to the parking lot to observe the employees handing out Union flyers, even though there was no blocking of the cars like that which occurred on October 11. (Tr. 1362–1366.) Cox also admitted that on October 25 he went out to the parking lot and stood there watching the union organizing. (Tr. 1381–1382.) He also acknowledged that on that day, the Security Officers walked through the parking lot while the employees were handbilling, and the Security personnel came in early that day and stayed late to observe the employees handing out flyers, when they had never before come in early and stayed late for any employee activities in the parking lot. (Tr. 1381–1384.)

The record also reflects that employees sell food out of their vehicles in the Company parking lot, such as vegetables, tacos, and watermelons. (Tr. 230, 1445–1447.) On such occasions, the security officers did not go out into the lot to watch the employees selling food and when such employee solicitation was occurring, the Security Officers did not monitor that activity in any way. (Tr. 248, 1318, 1367, 1447.) Thus, the employees have traditionally engaged in such activity without any security presence or interference.

16. In or about October 2017, in the employee parking lot, Supervisor Carlos Giron allegedly created the impression of surveillance of employees' union activities by telling an employee that he saw his picture on the Union's Facebook page.

As part of the Union's organizing drive, Organizer Castillo took photographs of some of the employees who supported the Union and posted them on the Union Facebook page, which was public. (Tr. 573.) Ascension Rios testified that at a time when employees were passing out Union flyers in the Company parking lot, Supervisor Carlos Giron approached him and said that he saw a photograph of him on the Union's Facebook page, and he mentioned that Rios was "with the Union." (Tr. 278–280.) According to Rios, Giron then showed him the Union Facebook page and picture that he had on his cell phone. (Tr. 278–280.) Rios acknowledged to Giron that it was him in the picture when he was at a Union meeting. (Tr. 279–280, GC Exh. 11.)[50]

Giron did not deny approaching and confronting Rios about his picture on the Union Facebook page. He testified that he saw the Facebook page that office employee Elena Martinez showed him when he was in the office. (Tr. 1331–1332, 1335–1337.) He admitted that on a day when employees were handing out Union flyers in the Company parking lot, he saw Rios in the lot talking to two other employees, and he told Rios that he was surprised because an employee had shown him a Facebook page and he was on it. He also told Rios that he was "surprised that he had some kind of complaints since [Giron] was trying to help him."[51] (Tr. 1332–1333.) Giron testified that Rios said he had been there for 17 years and it had not been easy. When Giron asked "how is that, if I've been helping [you]." (Tr. 1339.) According to Giron, Rios simply responded that "it has not been easy." (Tr. 1339.)

### *B. Analysis*

#### 1. The alleged violations of Section 8(a)(1) of the Act.

##### *a. The law*

Section 7, the cornerstone of the Act, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their rights guaranteed in Section 7 of the Act. It is well established that the test for interference, restraint, and coercion does not turn on the employer's motive or on whether the coercion succeeded or failed. *Onsite News*, 359 NLRB 797 (2013). Instead, the test is whether the employer engaged in conduct which tends to interfere with the free exercise of employee rights under the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *American Tissue Corp.*, 336 NLRB 435, 441–442 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). In making its determination, the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact on the employees. *American Tissue Corp.*, supra at 442 (citing *NLRB v. E. I. du Pont & Co.*, 750 F.2d 524, 528 (6th Cir. 1984)).

The Board has held that threatening employees with reprisals for engaging in union or other protected concerted activities is coercive to the exercise of their Section 7 rights under the Act. *Metro One Loss Prevention Services Group*, 356 NLRB 89, 89 (2010) (employer violates 8(a)(1) if it communicates to employees that it will jeopardize their job security, wages, or other working conditions if they support the union); *Baddour, Inc.*, 303 NLRB 275 (1991) (an employers' threats of discipline or job loss for participation in protected concerted activities constitute violations of the Act). The Board has applied this theory to explicit or implicit threats to employees, including the loss of their jobs or other adverse work consequences. *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1091–1096 (2004) (employer violated Sec. 8(a)(1) of the Act by threatening loss of benefits, loss of jobs, and closure of the facility if the employees supported the union); *Sheraton Hotel Waterbury*, 312 NLRB 304, 305 (1993) (implied threat contained in employer's posting

[49] Ortega testified that on all the days that he was out in the parking lot, he noticed that there were employees handing out Union flyers. (Tr. 1480, 1486.) In addition, Apolonia Rios testified that when she and other employees were passing out flyers in the parking lot on October 18, the security guards were out in the lot and they were watching her and the others handing out flyers. (Tr. 456–459.)

[50] The Facebook page was apparently for "Boar's Head Workers United." (Tr. 282.) Rios testified that when Giron confronted him about his presence on the Union's Facebook page, he was "mocking . . . it." (Tr. 279.)

[51] Giron denied that he showed Rios the Facebook page on his cell phone. (Tr. 1333.) Where Giron's testimony differed from that of Ascension Rios, I find that Rios was a credible and believable witness, and I credit his testimony over that of Giron, who I found to be less credible in his denial about showing Rios the picture on is cell phone.

violated Section 8(a)(1) of the Act); *Metro One Loss Prevention Services Group*, supra at 89–90 (employer implied working conditions could deteriorate if the employees supported the union organizing drive in violation of Sec. 8(a)(1) of the Act).

While the Board has found that an employer is free to make statements predicting the effects of unionization to employees, such statements must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [its] control." *NLRB v. Gissel Packing Co.*, supra at 618. If there is any implication that an employer may or may not take action solely on its own initiative for reasons unrelated to economic necessities and known only to the employer, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion. Id. at 618. Alleged threats that are questionable need not be explicit "if the language used . . . can reasonably be construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing an implicit or ambiguous threat. *KSM Industries*, 336 NLRB 133 (2001).

The Board has long held that employer threats or coercive statements that employee unionization would result in the loss of wages violate Section 8(a)(1) of the Act. *Oklahoma City Collection*, 263 NLRB 79, 80 (1982), enfd. mem. 679 F.2d 900 (9th Cir. 1982). Predictions of plant closures, loss of contracts, loss or transfer of work, loss of jobs, or changes in working conditions or benefits must be based on objective facts, and an employer must explain how a change in existing benefits and working conditions could result from the give-and-take of future collective bargaining rather than suggesting that employees, by entertaining the prospect of union representation, were courting the wrath of the employer. *Franklinton Preparatory Academy*, 366 NLRB No. 67, slip op. at 2 (2018). The burden of proof is on the employer to show that a prediction was based on objective fact. *Schaumburg Hyundai*, 318 NLRB 449 (1995).

*b. The bargaining from zero or "from scratch" threats by Habermehl in his meetings (complaint para. 5(a)), Guadalupe Rodriguez (in his conversations with Aguilar) (complaint para. 6(a)), and Respondent in its handout to employees titled "Boar's Head Brand," which threatened the loss of benefits.*

As mentioned above, the evidence establishes that in the mandatory meetings held by Corporate Director of Human Resources Habermehl in August 2017, in response to the Union's organizing campaign, he told employees that in any prospective negotiations with the Union, the Respondent would begin or start at "zero to the minimum" and that a lot of benefits could be lost. Several days later, Production Supervisor Rodriguez repeated Habermehl's coercive statement in a conversation with Walter Aguilar that employees could lose their bonuses and their picnics provided by the Company, and that Respondent would negotiate from zero if the Union came in. The Respondent nailed home those threats with a written document to all employees that it attached to their paychecks in which it reaffirmed its direct and unmistakable position that any negotiations would start from zero or the minimum, and not from what the employees currently had, if a union was voted in by the employees. That particular statement read:

> If a union gets in, will negotiations start with what we already have? No. If a union is voted in, negotiations will not start at current wages and benefits. Nobody knows what the final outcome of the contract will be because each item is negotiated starting with zero or the minimum allowed by law. If could be more but it could be less. (GC Exh. 6.)

Critically, Shannon Van Noy testified that the "Boar's Head Brand" handout document was an accurate reflection and summation of the statements made by Habermehl in his meetings. (Tr. 854–856.)

The Board has long held that "bargaining from scratch" statements by employers violate Section 8(a)(1) of the Act if they reasonably could be understood by employees as a threat of loss of existing benefits and provide employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. The duty to bargain ordinarily forecloses unilateral changes to terms and conditions of employment, and bargaining begins with existing wages and conditions of work. On the other hand, such statements do not constitute a violation of the Act when the employer's other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations. *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980) citing *TRW United Greenfield Division*, 245 NLRB 1135 (1979); *Stumpf Motor Co., Inc.,* 208 NLRB 431 (1974); *BP Amico Chemical*, 351 NLRB 614, 617–618 (2007) (statements regarding loss of existing benefits are evaluated in terms of whether they are more reasonably construed as a result of union selection versus a "possible outcome of good-faith bargaining).

The Board has stated that "'bargaining from scratch' is such a dangerous phrase which carries within it the seed of a threat that the employer will become punitively intransient in the event the union wins the election." It emphasized that when such a statement can be reasonably read in the context of a threat to either end existing benefits prior to bargaining or to "adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees" for selecting the union, it will find a violation of the Act. *Coach & Equipment Sales Corp.*, 228 NLRB 440, 440–441 (1977). In so finding, the Board stressed that the "presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks." Id.

In this case, Respondent's references to bargaining from zero to the minimum and similar statements went beyond descriptions of the normal give and take of collective bargaining and are more reasonably construed as a result of selection versus a possible outcome of good-faith bargaining. Those statements were also accompanied by contemporaneous threats that benefits, including bonuses and company sponsored picnics, could be lost. Those statements reasonably would be, and in fact were understood by the employees as threats to their existing wages and benefits, leaving them with the impression that what they might ultimately receive through collective bargaining would be dependent upon what the Union could recoup from the Respondent. In fact, the Board has specifically found that an employer's statement that bargaining on wages would start from the minimum wage was unlawful. *Oklahoma City Collection*, 263 NLRB 79,

82–83 (1982), enfd. mem. 679 F.2d 900 (9th Cir. 1982). As such, the statements discussed above violated Section 8(a)(1) of the Act.

*c. The threatening statements made by Supervisor Maria Mendoza to employees regarding the loss of benefits in the form of losing their grace period for donning and doffing (complaint para. 16(b)) and informing employees the Union would not be able to get them reinstated if Respondent terminates them and they will end up in court, thereby informing them that it would be futile to support the Union. (Complaint para. 18(c)).*

The record establishes that Production Supervisor Maria Mendoza approached Elba Rivas and other employees on the production line in October 2017, and asked them if they "would like to have the Union," and if they were "agreeing with the Union?" When one employee responded, Mendoza told the employees that if the Union came in the Company will take away the 7 minutes they were allotted for "donning and doffing" their safety and protective gear during breaks, and that the Company will take away their bonuses. In addition, in December 2017, Mendoza approached employee Ascension Rios in his work area and asked him if he supported the Union, and that if he did, the Respondent would "notice" him and he could end up "in court."

As mentioned above, an employer must explain how a change in existing benefits and working conditions could result from the give-and-take of future collective bargaining rather than suggesting that employees, by entering the prospect of union representation, were courting the wrath of the employer. *Franklinton Preparatory Academy*, 366 NLRB No. 67, slip op. at 2 (2018). In this case, Mendoza's statements lacked any objective basis and did not predict demonstrably probable consequences beyond the Respondent's control for the purported loss of "donning and doffing" time and bonuses for the employees. In fact, Mendoza never made any attempt to tie the loss of those existing benefits to the give-and-take of future collective bargaining. Id. slip op. at 2. As a result, Mendoza's statements went "well beyond advising employees of the potential consequences of good-faith collective bargaining and instead constituted statements threatening the loss of existing benefits and terms and conditions of employment." In addition, no objective basis was given for the statement that the Union would not be able to get them reinstated if they were discharged or that supporting the Union would somehow cause employees to end up in court, which was coercive and conveyed to them that it would be futile to support the Union. The Respondent thus failed to meet its burden of proving that Mendoza's statements or predictions were based on objective fact, and as such, these threats were coercive and in violation of Section 8(a)(1) of the Act.

*d. The unlawful interrogations of employees' union support and activities by Guadalupe Rodriguez (complaint para. 6(b)) and Maria Mendoza (complaint para. 16(a) and 18(a)).*

The record establishes that Guadalupe Rodriguez approached Aguilar while working on the line and asked him why he wanted the Union or what was the point of having a union. When Aguilar responded that he wanted the Union to help bring change, Rodriguez told him the Union was "no good," it only represented people who did not want to work, and that the employees would "feel sorry about it." Rodriguez's interrogation was also followed by statements that employee bonuses and the company sponsored picnics were at risk. Similarly, Maria Mendoza asked Elba Rivas and other nearby employees working on the line if they would like to have the Union, and if they were "agreeing with the Union." That inquiry was accompanied by Mendoza's statement that if the employees selected the Union, they would lose the 7 minutes they were allotted at the time for donning and doffing their safety gear during break times. In addition, Mendoza asked Ascension Rios in his work area if he supported the Union, and that if he did, he would be noticed by the Company and that he could "end up in court."

With issues of interrogation, the Board determines "whether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Scheid Electric*, 355 NLRB 160 (2010); *Metro-West Ambulance Service, Inc.*, 360 NLRB 1029 (2014); *Intertape Polymer Corp*., 360 NLRB 957 (2014); *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among the factors the Board considers in such an analysis are the identity of the questioner, the place and method of the interrogation, the background of the questioning, the nature of the information sought, and whether the employee is an open union supporter. *Scheid Electric*, supra at 160; *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295 (2009). While the Board will consider whether an employee is an open union supporter in determining whether an interrogation is coercive, that factor is merely one of many and is not determinative. *Norton Audubon Hospital*, 338 NLRB 320 (2002).

Applying these factors, I find that the questioning of employees by both Rodriguez and Mendoza was coercive. The identity of the questioners in this case reveals that the questioning came from the Respondent's statutory supervisors who possessed authority over the employees questioned, including authority to evaluate employees and possibly recommend wage increases. The Board has found questioning by similarly situated statutory supervisors to be coercive. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1182–1183 (2011). In addition, I find the fact that Rodriguez and Mendoza were the *direct* supervisors of the employees in question[52] reasonably tended to make the questioning that much more threatening. *Intertape Polymer Corp.*, 360 NLRB 957, 958 (2014); See e.g., *Station Casinos, LLC*, 358 NLRB 1556, 1557–1558, 1605 (2012).

The place and method of the interrogation in this case also weighs in favor of finding the questioning coercive. The instances of interrogation occurred at work while the employees were working on the production floor or their employee work area, which added to the coercive tendency of the questioning. Absent evidence that Rodriguez and Mendoza had an office or other location of authority at the plant, the production floor or area were their locations of authority over the employees, where

[52] Aguilar was directly supervised by Rodriguez. Rios and Rivas were directly supervised by Mendoza.

it is reasonable to believe their questioning would pressure the employees to feel a duty to respond to those in positions of authority over them. The Board has found interrogations under similar circumstances to be coercive and unlawful. *Camaco Lorain Mfg. Plant*, supra at 1182–1183; See, e.g., *Central Valley Meat Co*., 346 NLRB 1078, 1087 (2006) (finding unlawful an interrogation by a department foreman on the "kill floor" of a slaughterhouse).

I also find the nature of the information sought and whether the employees were open union supports added to the coercive tendency of the interrogations because the questioning concerned whether the employees supported the Union at a time when the Union's organizing campaign was a "big deal" at the Holland facility.[53] There is no evidence that Rivas was an open union supporter, and she did not respond to Mendoza's questioning. I find that her reluctance to answer her supervisor's inquiry about supporting the Union weighed in favor of finding that interrogation coercive. Aguilar and Rios were open about their union support, but that fact, however, is not determinative under the circumstances of this case where the other factors strongly weigh in favor of finding the interrogations coercive. In that connection, the background and nature of the interrogations show that the questioning was accompanied by the supervisors' threats about what adverse actions the Respondent could take against the employees if they supported the Union. After Aguilar responded to Rodriguez's question by stating his support for the Union, Rodriguez told him that the Union only represented those who did not want to work, the employees would "feel sorry about it," and that they risked losing their bonuses and the Company picnics if they supported the Union. Likewise, when Mendoza questioned Rivas about her union support, she told Rivas that supporting the Union would result in the loss of their donning and doffing time on breaks. In addition, when Mendoza questioned Rios about his support for the Union, she informed him that his support would be noticed by the Company and that he could "end up in court." In the context of these threats and Respondent's contemporaneous unfair labor practices found herein, the questioning of these employees regarding their support for the Union would reasonably tend to coerce the employees and restrain them from exercising their rights under Section 7 to engage in union activities and support.

In defense to these allegations, the Respondent argues that Mendoza's interrogations could not have occurred due to the noise on the production line and employees having to concentrate on their work. (R. Br. p. 56–58.) As mentioned above, I found the credible evidence established that Mendoza interrogated and made statements to the employees on the production line when it was running, and those credibility determinations were supported by the record evidence.[54] In addition, the Respondent argues that Rodriguez's questioning of Aguilar was not intended to be coercive and that it was not unlawful because "the conversation was friendly" and Rodriguez did not threaten or tell Aguilar that he would be punished for supporting the Union. (R. Br. p. 15.) These arguments lack merit for several reasons. First, contrary to Respondent's assertion, Rodriguez's interrogation *was* accompanied by threats that employee bonuses and the company sponsored picnics were at risk if the Union came in. Secondly, even if the interrogation was unaccompanied by a threat or intent to punish employees for their union support, the Board has held that intent or motive of the respondent is not relevant with regard to 8(a)(1) violations of the Act. *Exterior Systems, Inc.*, 338 NLRB 677, 679 (2002); *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006); *GM Electrics*, 323 NLRB 125, 127 (1997); see also *Williams Motor Transfer*, 284 NLRB 1496, 1499 (1987). In addition, the absence of threats of punishment is immaterial because Board law does not require that interrogations be accompanied by threats of punishment or retaliation for them to be found unlawful. *Oklahoma City Collection*, supra at 80. Finally, Respondent's assertion that the interrogation was not unlawful because it was "friendly" is also irrelevant. The fact that Aguilar may not have felt coerced by the interrogation is not relevant, as the Board has held that actual coercion is not the test of whether an interrogation violates Section 8(a)(1) of the Act. *Oklahoma City Collection*, supra at 81.[55]

Accordingly, I find that Rodriguez's and Mendoza's questioning of employees as to whether they supported the Union constituted unlawful interrogations of their union sympathies or support in violation of Section 8(a)(1) of the Act.

*e. The Respondent's solicitation of employee grievances and complaints by Bradley Rurka (complaint para. 7(a)), solicitation of employee grievances by Larry Helfant (complaint para. 8(b)) and his promise to increase benefits by changing the vacation policy (complaint para. 8(d)), and by a handout to employees entitled "Explanation of Changes to Policies" suggesting the use of a suggestion box (complaint para. 9).*

The record establishes that in this case, repeated and blatant solicitation of employee complaints and grievances was a crucial part of the Respondent's strategy to avoid having the Union successfully organize its employees. The record establishes that such solicitation occurred quickly and was done by some of the Respondent's highest-ranking corporate and local officials. Plant Manager Rurka, during his August 24, 2017 mandatory meetings with employees, read from a prepared script titled "24 Hour Speech," which informed employees that he was there to listen to and consider employee concerns, and respond in a way that reinforced to employees that they were a "family." (GC Exh. 9.) Rurka discussed specific policy changes to terms and conditions of work and informed the employees that "what [the Respondent is] changing is a good first step towards bringing our family back together." Rurka told the employees that it was unfair for them to expect the Company to "fix things we don't know

[53] Mendoza testified that the Union campaign was a "big deal" at the Holland facility. (Tr. 997.)

[54] Mendoza admitted she was able to briefly speak to employees working on the line when it was running, and Villalobos acknowledged it was possible to communicate with employees working on the production line. (Tr. 932–939, 999–1000.)

[55] In addition, I note that as legal authority in support of its assertion that Rodriguez's questioning was lawful, Respondent relies on *Hearthside Food Solutions*, an Administrative Law Judge Decision (without citation provided) that issued in 2012. I find the Respondent's reliance on that Decision is misplaced since exceptions to that Decision were not filed, and it was therefore never before the Board for review. As such, that Decision has no precedential value.

about," because even though a couple of issues had been raised before, "many of the things [the employees] listed had never been brought to our attention before." (GC Exh. 9, p. 6.) Rurka then asked the employees to keep communicating with management about their concerns so they could be addressed and possibly remedied. In that connection, he stated that Respondent was "bringing back" the employee suggestion box and promised that every comment would be considered and that management would report back to the employees on what could and could not be fixed. The improvements and changes in policy were then summarized in an "Explanation of Changes to Policies" that was issued to all employees with their paychecks and which stated: "Suggestion Box—The box in the hall by Accounts Payable is now a Suggestion Box. Use it." (GC Exh. 7.) Van Noy testified that while a suggestion box has been in the plant for a long time, it was rarely used by employees and in August 2017, the Respondent moved the suggestion box to a more prominent location so the employees would utilize it. (Tr. 712.)

A few days after Rurka's meetings, Helfant again visited the facility to hold mandatory meetings for the employees to get "general feedback" about "anything." He explained that he was there to hear and try to address their complaints, and that the two main issues were the vacation and attendance policies. Helfant also said he was aware of the problems at the plant and that he would like to "solve" their problems. A maintenance employee also testified that Helfant specifically asked the employees how Respondent could "help us out in maintenance . . . with providing us with tools . . .," he asked what the employees "find the Company [is] at fault for," and he inquired about the employees' opinions concerning the Company's policies.

The record establishes that Rurka and Helfant conveyed that the Respondent was willing and able to address and solve employee concerns and complaints, thereby inferring that selecting a union as their bargaining representative was not necessary. The Board has held that the solicitation of employee grievances during an organizing campaign "raises an inference that the employer is promising to remedy the grievances," which is an inference that is "particularly compelling when, during a union organizational campaign, an employer has not previously had a practice of soliciting employee grievances." *Garda CL Great Lakes, Inc.*, 359 NLRB 1334 (2013), citing *Amptech, Inc*., 342 NLRB 1131, 1137 (2004); *Desert Aggregates*, 340 NLRB 289, 297–298 (2003) (Employer statements that union campaign had "rung bells all the way to the top" of the company coupled with an appeal that employees should "give the company a year" to see what changes would be made, constituted an unlawful solicitation and promise to remedy employee grievances); *Jefferson Smuffit Corp.*, 325 NLRB 280, 283 (1998) (Employer's statement to employees "if you have further problems or there's things in the plant that you don't like, why don't you give us a chance to address them," found to be unlawful solicitation and implied promise to remedy grievances); See also *Multi-Natl. Food Serv.*, 238 NLRB 1031, 1036 (1979), citing *Merle Lindsey Chevrolet, Inc.*, 231 NLRB 478 (1977). It is also established that it is not the solicitation of grievances itself that violates the Act, but the employer's explicit or implicit promise to remedy the solicited grievances that impresses upon employees the notion that union representation is unnecessary. See *Wal-Mart Stores*, 340 NLRB 637, 640 (2003).

The Respondent argues that the statements were not unlawful solicitations because the Company had a "past practice" of soliciting grievances, and where such practice exists, an employer "may continue to do so during a union campaign." (R. Br. p. 19.) In support of this argument, the Respondent relies on the fact that prior to the Union organizing, it had routinely inquired whether employees had complaints or concerns about work, using methods such as: monthly "Town Hall" meetings with two employee representatives from each department who could share their concerns (Tr. 874–875; 1005, 1038–1039); maintaining an "open door" policy (Tr. 1041); maintaining "suggestion boxes" (Tr. 1041); by conducting "Stay Interviews" for employees to "check in" (Tr. 1039–1040); and by conducting "exit interviews" where departing employees are asked their reason for leaving the Company. (Tr. 1040.)

The Respondent's argument, however, lacks merit. The evidence establishes that while the Respondent had provided for the solicitation of grievances through Town Hall meetings, an open door policy, a suggestion box, and stay/exit interviews, the solicitation of grievances in response to the Union organizing campaign went beyond those methods, and it was done specifically in response to the union campaign and for the explicit purpose of responding to the campaign, despite Respondent's denials to the contrary. The Respondent's chosen form for soliciting employee grievances after knowledge of the Union organizing was also distinguishable from its past practices because, as opposed to suggestion boxes that were seldom utilized, Town Hall meetings, an open door policy, and interviews, the Respondent's solicitations at issue were done by mandatory meetings for all employees with some of its highest ranking officials who traveled from the Corporate headquarters, and the plant manager, who was the highest ranking local official. The Respondent's approach to having some of its highest corporate and local officers solicit grievances is different from its past practice and would reasonable have given employees the idea that those grievances would be more likely to be resolved and fixed because they were coming from those in a position to make such changes a reality.

The Respondent's argument that the solicitations of grievances was not unlawful because it was done the same way it had solicited grievances before the Union's campaign is also belied by the fact that many of the grievances aired by the employees in the solicitations at issue were different than previous solicitations. In that connection, the Respondent acknowledged in Rurka's speech that distinction when it told the employees that "it was unfair for you to expect us to fix things we don't know about. While a couple of issues had been raised before, many of the things you listed *had never been brought to our attention before*." (GC Exh. 9, p. 6) (emphasis added). The past practice of solicitations also differs from the solicitations at issue in that they were solicitations from individual employees or employee representatives in Town Hall meetings, while the instant solicitations were to all production and maintenance employees in

mandatory meetings held by Respondent's highest officials.[56]

The Respondent's post-campaign solicitations were therefore distinguishable from the "practice" it maintained prior to the union campaign. The Respondent's solicitation of employee grievances during the organizing campaign, accompanied by the express or implied promises to remedy them, created compelling inferences that the Respondent was promising to remedy those grievances. *Laboratory Corp. of America Holdings*, 333 NLRB 284 (2001). The inference that an employer that solicits grievances in a pre-election setting will remedy such grievances is rebuttable. *Uarco Inc.*, 216 NLRB 1, 2 (1974). That inference, however, has not been rebutted here. There is no evidence that the Respondent previously held similar mandatory employee meetings with its highest ranking corporate and local officials to solicit employees' concerns about their working conditions, nor is there evidence that it promised to remedy grievances it received in the prior solicitations. In addition, there is no evidence that the Respondent previously followed up its past practice of soliciting grievances with handouts to employees such as its "Explanation of Changes to Policies," where it informed them that the solicited complaints were being changed or remedied, as it did shortly after Rurka's and Helfant's meetings.[57]

I find that the Respondent's statements to employees by Rurka and Helfant, and its notification to employees to use the suggestion box that had been moved to a more prominent location in its "Explanation of Changes to Policies," were clearly solicitations of grievances and implied, if not explicit, promises to remedy those grievances. As the U.S. Supreme Court has held in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964): "[t]he danger inherent in well-timed increases to in benefits is the suggestion of a fist inside a velvet glove." The employees in this case were not likely to miss the inference that the source of benefits now being conferred were also "the source from which future benefits must flow and which may dry up if it is not obliged." Id. at 409. The Respondent therefore violated Section 8(a)(1) of the Act as alleged.

*f. The allegation that Shannon Van Noy and security guards on four separate occasions (October 11, 18, 25, and November 16, 2017), engaged in surveillance and created the impression of surveillance of employees' union activities. (Complaint para. 12(a).)*

During the handbilling that occurred on October 11, 2017, Security Officer Gerald Cox and other security personnel went out to the parking lot because cars were slowing down or stopping to receive Union flyers that were being handed out. It is undisputed that during the time of the employees' shift change, traffic in the parking lot was backed up. Cox, Security Supervisor Ronald Ortega, and other security officers went out to maintain a safe environment and to keep traffic moving during the shift change that started at 2:30 p.m. (Tr. 1346–1352.) At that time, the guards, verbally and by using hand motions, told those in their cars to keep moving so the parking lot traffic would flow. While out in the parking lot tending to the traffic backup, they observed employees handing out Union flyers. However, Ortega and the security detail remained in the parking lot the entire time that the employees were attempting to distribute their Union literature, even after the traffic backup ended, and they admitted that they continued to watch employees engaged in union activity and they continued to encourage other employees in their vehicles to keep moving past the handbillers. Even after the traffic stopped being backed up, and after Van Noy, Rodriguez, and Emmons returned to the facility, Ortega remained in the parking lot for 2 and a half hours that day "observing" the employees handbilling, and he noticed when employees took flyers and when they did not.

When the employees handed out union literature in the parking lot on October 18, 25, and November 16, they were again joined by various security guards and personnel who continued to observe the employees and direct vehicles to keep moving past the handbillers. On those occasions, however, there were no significant traffic backups or instances where cars were prevented from safely exiting the lot. Ortega even acknowledged that on October 18, 25, and November 16, in terms of cars being unable to get out of the parking lot, "it wasn't bad." Despite the lack of traffic backups on those dates the security personnel nevertheless went out to the parking lot to "observe what was going on," and at times they were in close proximity to the employees handbilling. In particular, despite observing the employees handing out Union flyers when there were no traffic problems like that which occurred on October 11, Cox acknowledged that on October 25 the Security Officers came in early that day and stayed late to observe the employees handing out flyers, when they had never before come in early and stayed late for any employee activities in the parking lot.

With regard to surveillance, it is well established that management officials may observe open and public union or protected activity on or near the employer's premises, without violating Section 8(a)(1) of the Act, unless such officials engage in behavior that is "out of the ordinary" and thereby coercive. *Aladdin Gaming, LLC*, 345 NLRB 585, 585–586 (2005); *Sands Hotel & Casino, San Juan,* 306 NLRB 172 (1992), enfd. sub nom. mem. *S.J.R.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993); *PartyLite Worldwide, Inc.*, 344 NLRB 1342 (2005); *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982). In determining whether an employer's surveillance is unlawful, the Board considers indicia of coerciveness, which include the duration of the observation, the employer's distance

[56] The Respondent's "Explanation of Changes to Policies" suggesting the use of a suggestion box was also provided to all hourly employees, and not just to individual employees.

[57] The precedent cited by the Respondent is also distinguishable from the facts of this case. In that connection, the Respondent relies on *Johnson Technology, Inc.*, 345 NLRB 762 (2005). In that case, the supervisor approached an employee at her machine and solicited grievances where the employer had an established pattern of soliciting employee grievances in that manner. While the solicitation in *Johnson Technology* concerned a single employee, the solicitation in the instant case involved soliciting grievances from all the production and maintenance employees in mandatory meetings held by the highest-ranking officials, which was not Respondent's established past pattern or method of soliciting grievances. In addition, the supervisor in *Johnson Technology* did not expressly or impliedly promise to remedy the employee's concerns, whereas in the instant case, the Respondent impliedly, if not expressly, promised that the grievances would be remedied.

from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Aladdin Gaming*, supra at 586.

In this case, even though the employees handed out Union literature in the open on the Respondent's property and in view of the public, Respondent's security officers, on all four occasions went out to the parking lot and at times followed and were in close proximity to the employees. They also observed the employees engaged in that union activity for extended periods of time, including at least one occasion when the Security Officers came in early and stayed late to observe the employees handing out flyers, when they had never before done that for any activities in the parking lot. In addition, they engaged in other coercive behavior during their observation, such as continuing to encourage employees to keep moving past the employees handing out flyers even when the traffic was not backed up.

It is important to note that the record is devoid of any evidence that Security Supervisor Ortega stood out in the parking lot on a regular basis for long periods of time to observe employees. Likewise, there is no evidence that Respondent's security personnel had a regular practice of standing in close proximity to employees while they were in the parking lot, and that security regularly discouraged employees from communicating with each other while in the parking lot. In fact, the record establishes that it was not unusual for employees to meet and congregate in the Company parking lot for various purposes, such as selling food out of their vehicles. On those occasions, the security officers did not go into the parking lot to observe or monitor that activity in any way, and the employees traditionally engaged in such activities without security presence or interference.

The Respondent argues that the guards were required to be in the parking lot because of the traffic backup and due to employee safety, and they were not there to surveil the employees who were handbilling. (R. Br. p. 46.) This argument is unsupported by the evidence and it lacks merit. It may have been permissible for security guards to watch what was going on and attempt to alleviate the backup of traffic in the lot on October 11 during the shift change, when it is undisputed that traffic was backed up. However, after the traffic backup ended that day, security remained in the lot and continued to follow and observe the employees handing out union flyers. In addition, no such significant backups or traffic problems occurred on October 18, 25, or November 16, when security still went out to the parking lot to follow and observe the employees who were engaged in handing out union literature. I find that such conduct on all 4 days of the employees' handbilling activity, except for the time period of the shift change on October 11, was "out of the ordinary," and it was coercive and clearly constituted unlawful surveillance of the employees' protected union activities in violation of Section 8(a)(1) of the Act.[58]

*g. Supervisor Carlos Giron, about October 2017, in the employee parking lot, allegedly created the impression of surveillance of employee union activities by telling an employee that he saw his picture on the Union's Facebook page. (Complaint para. 17.)*

In determining whether a statement or question created an unlawful impression of surveillance, the Board considers "whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance." *Camaco Lorain Manufacturing Plant*, 356 NLRB 1182, 1183 (2011); *Frontier Telephone of Rochester, Inc*., 344 NLRB 1270, 1276 (2005), enfd. mem. 181 Fed. Appx. 85 (2d Cir. 2006) (citing *Flexsteel Industries*, *Inc.,* 311 NLRB 257 (1993)); *Schrementi Bros.*, 179 NLRB 853 (1969). The Board has noted that impression of surveillance violations do not require a finding that the employees involved attempted to keep their union activities secret, or that the employer used unlawful means to obtain knowledge of the employees' union activities. *Frontier Telephone of Rochester, Inc*., supra at 1276 fn. 19; See also *United Charter Service*, 306 NLRB 150, 151 (1992).

The Board has held that "[t]he idea behind finding 'an impression of surveillance' as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999) (citing *Flexsteel Industries*, supra at 257). In determining whether an employer's statements or conduct unlawfully create the impression of surveillance, the "essential focus has always been on the *reasonableness* of the employee's assumption that the employer was monitoring their union or protected activities." *Frontier Telephone of Rochester, Inc*., supra at 1276. The critical element of reasonableness is analyzed under an objective standard, and not by the subjective reaction of the employee involved, to determine whether the employer's actions tend to restrain, coerce, or interfere with the employee's Section 7 rights. Id.; *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992).

In this case, one of Respondent's office employees, on her own volition, told Supervisor Carlos Giron that some of the Respondent's employees, including Ascension Rio, had their photographs on the Union's Facebook page on the internet, and she

[58] The Respondent also argues that the General Counsel's amendment of the complaint allegations from denial of employee access to the parking lot to allegations of unlawful surveillance, denied it due process because it was allegedly "prevented from presenting evidence denying surveillance." (R. Br. p. 49.) There is no merit to this allegation. Under Sec. 102.17 of the Board's Rules and Regulations, a judge has wide discretion to grant motions to amend a complaint. *Las Palmas Medical Center*, 358 NRLB No. 54 fn. 1 (2012); *Empire State Weeklies, Inc*., 354 NLRB 815, 816 (2009). Moreover, if the matter has been fully litigated, and the amendment conforms the complaint to the evidence, the Board has stated that the motion to amend generally should be granted. See, e.g., *Pincus Elevator & Electric Co.*, 308 NLRB 684, 685 (1992), enfd. 998 F.2d 1004 (3d Cir. 1993). In the instant case, the original and amended allegations involved the same individuals (Respondent's human resource personnel and security guards), the same location (the Respondent's parking lot), the same dates (October 11, 18, 25, and November 16, 2017), and the same activities that occurred in that parking lot. The amendments also conform the complaint to the evidence, and the Respondent called and elicited testimony from most, if not all, of the Respondent's witnesses that were involved in the alleged surveillance activity. Finally, there is no evidence that the Respondent was prejudiced in any way by the amendments to the complaint.

then showed him the Facebook page that she had on her cell phone. Shortly thereafter, on one of the occasions when employees were passing out Union flyers, Giron approached Rios in the Company parking lot and told him that he saw Rios' photograph on the Union's Facebook page, and he stated that Rios was "with the Union." Rios acknowledged that he was in the picture with a group of employees who were at a Union meeting. (Tr. 279.) The record reflects that the Facebook page "Boar's Head Workers United" was publicly accessible on the internet. (Tr. 282.) Giron acknowledged approaching and confronting Rios and telling him that he was surprised that Rios was on the Union Facebook page.

The General Counsel argues that when Giron informed Rios that he had been looking at the Union Facebook page and that he was surprised Rios was on it, it was reasonable for Rios to believe or assume that Giron was in some way monitoring employees' union and protected activities. The Respondent, however, argues that Giron's statement to Rios did not create the impression of surveillance because the photograph was "intentionally and publicly posted to Facebook" and the posting was "publicly accessible." (R. Br. p. 62.)

I find the Respondent's argument has merit. It is clear from the record that Rios was open about his Union activities and support. Union Organizer Castillo testified that he took the photograph of the employees with the intent to post it on Facebook, which was accessible to the public, and to post it showing the identity of the Union supporters to aid the Union's organizing campaign. (Tr. 572–573.) Those employees, including Rios, authorized the Union's use of the photograph for the public forum. (Tr. 573.) Under these circumstances, it is not reasonable for an employee to assume from the statement in question that his union activities had been placed under surveillance. The Board has found under similar circumstances that an employer's actions did not create an unlawful impression of surveillance. In *Frontier Telephone of Rochester, Inc*., supra at 1276, the Board found that an employer did not unlawfully create the impression of surveillance where a supervisor mentioned to an employee that he knew about the employee's message posted on a union website that was forwarded to him by another employee. In that case, the Board found it significant that the employee acknowledged that message posted on the website was accessible to the public and could be read by others, and the employee should have reasonably assumed that the posting was subject to public dissemination to other website subscribers. Id. Therefore, the supervisor's conduct did not create the impression that his union activities were under surveillance. Id.

In support, Respondent cites *Manor Care of Decatur*, 327 NLRB 980, 980 (1999), which is not directly on point with the facts of this case, but is similar in that the employee involved (Minter) actively supported the Union and frequently wore union hats and numerous union buttons on her work uniform. The supervisor in that case made comments in Minter's work evaluation that she needed to review the dress code because she wore large buttons on her work clothes, which was admittedly a comment about her wearing union buttons. Id. In that case, the Board found the comments did not unlawfully create the impression of surveillance because Minter's wearing of union buttons "was public and a matter of common knowledge." Id. *Manor Care of Decatur* is therefore persuasive in that Rio was also open about his union support and he gave permission to have his photograph posted on a public forum in support of the Union's organizing drive.

Under all the relevant circumstances, Rios' union activity was in the open, and thus there was no reason for him to believe that Giron acquired his knowledge by spying on the activity. A reasonable employee would not assume from the statement in question that his union activities had been placed under surveillance. *Camaco Lorain Manufacturing Plant*, supra; *Frontier Telephone of Rochester, Inc*., supra; *Flexsteel Industries*, *Inc.,* supra; See e.g., *Michigan Roads Maintenance Co.*, 344 NLRB 617, at fn. 4 (2005) (Board dismissing impression of surveillance allegation where the employer's statement revealed awareness of employee's open union activity). As such, I find that Giron's statement to Rios did not create the impression that his union activities were under surveillance in violation of Section 8(a)(1) of the Act, and I will dismiss that allegation.

*h. The Respondent maintained an unlawful rule stating that "wearing unauthorized badges, pins, or other items on helmet or exterior garments" was an example of misconduct that is very serious and will result in progressive discipline (complaint para. 20)*

It is well established that employees have a protected right to wear union insignia at work in the absence of special circumstances. *Long Beach Memorial Center, Inc., d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66, slip op. at 2 (2018); See *George J. London Memorial Hospital*, 238 NLRB 704, 708 (1978). The Board has held that an employer may not prohibit employees from wearing button and pins containing union or other protected concerted messages unless the employer can show special circumstances justifying the restriction. *Arden Post-Acute Rehab*, 365 NLRB No. 109, slip op. at 17–18 (2017); *In-N-Out Burger, Inc.*, 365 NLRB No. 39 (2017), enfd. 894 F.3d 707 (5th Cir. 2018); *Boch Honda*, 362 NLRB 706, 707 (2015), enfd. 826 F.3d 558 (1st Cir. 2016); *Cintas Corp*., 353 NLRB 752 (2009). The Board has only found special circumstances justifying the proscription of union insignia when the item or display jeopardizes employee safety, equipment or product safety, or unreasonably interferes with a public image which the employer has established as part of its business plan. *United Parcel Service*, 312 NLRB 596, 597 (1993), citing *Nordstrom Inc*., 264 NLRB 698, 700 (1982).[59]

[59] In *Boeing Co.*, 365 NLRB No. 154 (2017) the Board adopted a new standard for evaluating an employer's work place rule, policy, or handbook provision, wherein the *Boeing* test considers both the legitimate justifications associated with the disputed rule and any adverse impact the rule may have on protected activity. The Board in *Boeing*, however, did not alter its well-established standards regarding certain kinds of rules where the Board has already struck a balance between employee rights and employer business interests. As it pertains to the instant case, the *Boeing* decision did not deal with the "special circumstances" test of apparel rules. See, e.g., *Long Beach Memorial Center, Inc., d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66, slip op. at 1–2 (2018) (finding

The Respondent's proffered special circumstances for proscribing "unauthorized badges, pins or other items on helmet or exterior garments" is food safety and to avoid product contamination by foreign objects or material that may be brought in on employees' clothing, which is certainly reasonable and justified. The Respondent argues that rule applies only to food production and exposed food storage areas of the plant, and not to non-production areas. (R. Br. p. 68–69.) The problem with the rule, however, is that it makes no distinction between production areas and non-production areas. A rule that curtails employees' Section 7 rights to wear union insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule, and the employer bears the burden of proving such special circumstances. *Boch Honda*, supra, at 707; *P.S.K Supermarkets*, 349 NLRB 34, 34–35 (2007). In addition, the Board has held that while special circumstances may justify an employer's ban on buttons worn in public areas, it does not necessarily justify a ban on such buttons worn in non-public areas. *W San Diego*, 348 NLRB 372, 373–374 (2006). In this case, the Respondent's witnesses acknowledged that Respondent had no need to prohibit badges and pins in non-production areas.[60] (Tr. 826–827, 1571–1572.) Since the Respondent has failed to demonstrate special circumstances justifying its absolute prohibition on badges and pins in non-production areas, its maintenance of this overly broad rule prohibiting badges and pins violates Section 8(a)(1) of the Act.

2. The alleged violations of Section 8(a)(3) and (1) of the Act.

*a. The Respondent's suspension and discipline of employee Walter Aguilar on or about August 25 and 31, 2017 (complaint paras. 21 and 23)*

It is undisputed that Walter Aguilar was an open union supporter and in one of the meetings held by Habermehl on August 21–22, 2017, he challenged Respondent's claims regarding the working conditions at the unionized Virginia plant. In addition, a few days later, Supervisor Rodriguez unlawfully interrogated him regarding his support for the Union.

The Respondent received a report on or about August 28 from an employee that Aguilar, who worked on the "boxing line" packaging meats in boxes for shipment, was alleged to have been telling employees to take it easy or slow down their work on that line. Van Noy, determining it was a serious situation, reported to Habermehl the conduct Aguilar was accused of, and that he was a union supporter out of concern that possibly discipling a Union supporter could be scrutinized. Habermehl responded that he should be treated like any other employee. The Respondent conducted an investigation by speaking with Aguilar, who denied telling employees to slow down in their work, but he subsequently admitted telling employees that he did not feel he should have to do the work of two people. Aguilar was suspended pending an investigation to eliminate the chances of having him on site attempting to talk to and influence witnesses to his alleged conduct. Aguilar admitted that he told employees to "work easy" because there was a lot of "pressure" and employees were being injured. He acknowledged, however, that the line on which he worked was fully staffed and even though he thought there were not enough employees on the production line, he never complained to management about it and he never filed any safety concerns. There is no evidence that production was affected by Aguilar's statement or that any employees had been injured due to the pace of the production line.

In interviews conducted by Cochran, none of the employees said that Aguilar told them to slow down production or stop working. However, some reported that Aguilar asked them why they were hurrying, he mocked an employee and told him not to work so hard and that he should relax, and he told employees not to work so hard. Another reported that Aguilar told one employee to hurry up and then said that the harder she worked, Respondent would only pressure her to work harder. In addition, one employee reported that Aguilar had told him not to work so hard.

The Respondent's investigation was completed in 1 day and Cochran determined from the employees interviewed that on many occasions Aguilar told employees to slow down their work. After Aguilar served his 3-day suspension, his suspension was rescinded and he received a written warning for attempting to cause a work slowdown. Cochran testified that Aguilar was disciplined because he encouraged employees to slow down in the past as well as what was reported at that time, and that progressive discipline was appropriate. His written warning stated that "[d]uring the investigation it was reported that you made statements to multiple individuals encouraging them to not work so fast or too hard," in violation of Company Work Rule 2.23– "Restricting own production or interfering with production of other employees." No employees had previously been disciplined for the same offense and even though the investigation was completed in 1 day, Aguilar remained on administrative suspension for the following 2 days because Van Noy needed to speak with supervision and plant manager as a team. Aguilar was subsequently paid for the days he was suspended pending the investigation.

As mentioned above, Section 7 of the Act provides in part that employees "shall have the right to self-organization, to form, join, or assist labor organizations. . . ." To ensure that employees are free to exercise their Section 7 rights without fear of reprisal, Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate against employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Thus, the Act prohibits employers from discriminating against employees by disciplining or discharging them on the basis of their union activities and/or for exercising their organization and collective-bargaining rights, including their right to engage in concerted activities for the purpose of mutual aid and protection. See *MCPC Inc. v. NLRB*, 813 F.3d 475, 479 (3d Cir. 2016).

employer's restrictions on wearing union pins overbroad and unlawful without reference to the *Boeing* test).

[60] Shannon Van Noy testified that purpose of the rule is food safety and to avoid contamination of the product and wearing of pins and jewelry should only be prohibited in the production and production storage areas.

Where an employer argues that it disciplined an employee for reasons unrelated to union or protected activity, the Board and the courts rely on the so-called "mixed motive" or "dual motive" discharge test set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983); See also *MCPC Inc. v. NLRB*, 813 F.3d 475, 490 (3d Cir. 2016). In *Wright Line*, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) of the Act turning on employer motivation. Under *Wright Line*, the General Counsel bears an initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action at issue. Id. at 1089. The General Counsel satisfies the initial burden under *Wright Line* by showing that: (1) the employee engaged in union and/or protected concerted activity; (2) the employer had knowledge of that activity; and (3) there was animus against that activity on the part of the employer. *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op. at 1 fn. 3 (2019); *Strongsteel of Alabama, LLC*, 367 NLRB No. 90, slip op. at 1 (2019); *Donaldson Bros. Ready Mix,* 341 NLRB 958, 961 (2004); *North Fork Service Joint Ventures*, 346 NLRB 1025, 1026 (2006); *Willamette Industries*, 341 NLRB 560, 562 (2004); See also *DHL Express (USA), Inc.*, 360 NLRB 730 (2014).

The Board's *Wright Line* test is, and has always been, inherently a causation test. *Tschiggfrie Properties, Ltd*., supra at slip op. 8. The Board, in clarifying the General Counsel's initial burden under *Wright Line*, and in particular its requirement of evidence of animus, has held that circumstantial evidence of any animus or hostility toward union or protected concerted activity is not enough to satisfy that burden. *Tschiggfrie Properties, Ltd*., supra slip op. at 8. To meet that initial burden, the evidence of animus must support a causal relationship between the employee's union or protected concerted activity and the employer's adverse employment action. Id. slip op. at 1.

It is well established that proof of animus or discriminatory motivation can be based on direct evidence or, under certain circumstances, it may be inferred from circumstantial evidence based on the record as a whole. See *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003); See also *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992). As support for an inference of unlawful motivation, the Board may rely on, among other factors, disparate treatment of the affected employee and the timing of the discipline relative to the employee's protected activity. See *Embassy Vacation Resorts*, supra at 848. In addition, the Board may infer animus against protected activities from pretextual reasons given for the adverse employment action. *DHL Express*, supra, slip op. at 1 and fn.1. When an employer's stated reasons for its decision are found to be pretextual—that is, either false or not in fact relied upon—"discriminatory motive *may* be inferred, but such an inference is not compelled." *Electrolux Home Products*, supra, slip op. at 3. "If [a trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference." Id.; See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).[61]

The Board, however, has held that some kinds of circumstantial evidence are more likely than others to satisfy the General Counsel's initial burden. In that connection, the Board stated:

> For example, evidence that an employer has stated it will fire anyone who engages in union activities, while undoubtedly 'general" in that it is not tied to any particular employee, may nevertheless be sufficient, under the circumstances of a particular case, to give rise to a reasonable inference that a causal relationship exists between the employee's protected activity and the employer's adverse action. In contrast, other types of circumstantial evidence—for example, an isolated, one-on-one threat or interrogation directed at someone other than the alleged discriminate and involving someone else's protected activity—may not be sufficient to give rise to such an inference. *Tschiggfrie Properties, Ltd*., supra at 8.

Thus, the Board has held that the General Counsel does not invariably sustain his burden by producing—in addition to evidence of the employee's protected activity and the employer's knowledge thereof—any evidence of the employer's animus or hostility toward union or other protected activity. The evidence must instead be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. Id.

Once the General Counsel makes such a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's adverse action, the burden then shifts to the employer to establish by a preponderance of the evidence that the same action would have taken place even in the absence of the employee's union or other protected concerted activity. *Tschiggfrie Properties, Ltd*., supra, slip op. at 1, fn. 3; *Strongsteel of Alabama*, supra, slip op. at 1; *Lucky Cab Co.*, 360 NLRB 271, 276 (2014); *Austal USA, LLC*, 356 NLRB 363, 364 (2010); See also *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961 (2004). This burden may not be satisfied by an employer's proffered reasons that are found to be pretextual, (i.e., false reasons or reasons not in fact relied upon for the adverse employment action). In rebutting the General Counsel's prima facie showing that the protected conduct was a "motivating factor" in the employer's decision, the employer cannot simply present a legitimate reason for its action but must persuade, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

In this case, the General Counsel has shown that Aguilar was engaged in union activities and the Respondent had knowledge of those activities. There is, however, no direct evidence of any animus towards Aguilar's participation in union activities.

[61] "The absence of any legitimate basis for action, of course, may form part of the proof of the General Counsel's case." *Wright Line*, 251 NLRB at 1088 fn. 12 (citing *Shattuck Denn Mining*, supra).

Nevertheless, the General Counsel submits that circumstantial evidence infers discriminatory motive or animus demonstrated by: (1) the timing of the discipline was in close proximity to his union activities; (2) the Respondent's contemporaneous unfair labor practices "demonstrating its animus to the Union organizing activity;" and (3) the asserted reason for Aguilar's discipline was pretextual, as allegedly shown by a "failure to conduct any meaningful investigation," and Respondent's disparate treatment of Aguilar as related to other employees. (GC Br. p. 35.)

It is well-established that the timing of an employer's adverse action could constitute circumstantial evidence of unlawful motivation. *Success Village Apartments*, 348 NLRB 579, 579 fn. 5 (2006). The General Counsel asserts that animus should be inferred based on the timing of Aguilar's discipline in relation to his union activity. In this case, the discipline occurred shortly after Aguilar's union activity, and timing alone may be enough to infer unlawful motivation. However, the operative word is "may," not must. *U.S. Cosmetics Corp.*, 368 NLRB No. 21, slip op. at 2 fn. 6 (2019). With regard to the requirement of unlawful motivation, the General Counsel argues that evidence of "animus toward the Union organizing activity" is found in the Respondent's contemporaneous unfair labor practices in this case, and that he has therefore met his prima facie burden. As mentioned above, however, the General Counsel must establish that the employee's protected conduct was, *in fact*, a motivating factor in the Respondent's decision,[62] and it has held that the General Counsel "does not *invariably* sustain his burden by producing—in addition to evidence of the employee's union or protected activity and the employer's knowledge thereof—*any* evidence of the employer's animus or hostility toward union or other protected activity." *Tschiggfrie Properties, Ltd.*, supra, slip op. at 8. Instead, the evidence of animus must be sufficient to establish that a causal relationship between the protected activity of that employee and the employer's adverse action against that employee. Id. slip op. at 1 and 8. While the Respondent's contemporaneous unfair labor practices in this case clearly demonstrate its animus to the Union's organizing in general, it is nevertheless insufficient under the extant Board law to establish "a connection or nexus" between the Aguilar's protected activity and the employer's discipline issued to Aguilar. Id. slip op. at 3.

With regard to the General Counsel's argument that evidence of animus should also be inferred by that fact that Respondent allegedly failed to conduct a meaningful investigation of the allegations against Aguilar, the evidence establishes otherwise. The Respondent, concerned that disciplining a Union supporter would subject it to scrutiny, reported Aguilar's infraction to the corporate head of human resources, who informed human resources to treat the matter as it would any other. The record shows that the Respondent then conducted an investigation by interviewing Aguilar and other employee witnesses, and then consulted with supervision and management before deciding that Aguilar had in fact violated one of its work rules. The fact that no employees stopped working or that production was diminished, is not material as the rule does not require that the employee who allegedly breached the rule was successful in affecting production, or that the employee's attempt to having employees slow their work was actually effective.

Finally, with regard to the General Counsel's assertion that animus is shown by the fact that Aguilar was treated differently than other employees who committed infractions, the record reveals that no other employees had been accused of engaging in conduct similar to that of Aguilar's. In support of that argument, the General Counsel states that employees who engaged in more egregious behavior, such as verbal altercations, were not placed on administrative suspension pending investigation and they were issued non-disciplinary coaching notices or letters of "behavioral expectations" instead of written warnings. (GC Exh. 24–26.) Admittedly though, one employee received a written warning like Aguilar for shouting at another employee after being warned of such behavior in the past. (GC Exh. 23.) The fact of the matter is, however, that the other employees referenced by the General Counsel were not accused of engaging in conduct similar to Aguilar. (Tr. 869–872, 1076–1079.) Therefore, the evidence is insufficient to establish disparate treatment of Aguilar.

Based on the above, I find that while Aguilar was engaged in union activities and the Respondent had knowledge of those activities, the General Counsel failed to establish beyond a preponderance of the evidence that those union activities were a motivating factor in his suspension pending investigation and his subsequent written disciplinary warning. The record is devoid of any evidence that the Respondent harbored animus toward Aguilar's union activities. Critically, the evidence is speculative at best, and insufficient to support any reasonable inference of unlawful motivation or animus towards Aguilar's union activity by the Respondent. That includes the fact that the evidence fails to show pretext for unlawful motivation, and there is no evidence, either direct or circumstantial, that Respondent failed to conduct a meaningful investigation or that Aguilar was treated differently than others. See, *Tschiggfrie Properties, Ltd*., supra slip op. at 1 and 8. As such, the General Counsel failed to satisfy his burden of establishing a prima facie case of discrimination. Accordingly, the Respondent did not violate the Act by suspending and disciplining Aguilar, and that complaint allegation will be dismissed.[63]

*b. The Respondent's increase in benefits to employees by providing hand tools for maintenance employees and improving the attendance and vacation policies. (Complaint para. 24 and 26.)*

The record establishes that once the Respondent had knowledge of the Union's organizing campaign, it sought ways to address the issues that were driving its employees to consider having a union represent them. At that time, Respondent required its maintenance employees to buy their work tools, and it found out on August 9, 2017 that Union organizers had specifically talked to maintenance employees about the fact that they

[62] See, e.g., *Manno Electric*, supra at 280 fn. 12.

[63] I further find that, even if the General Counsel made a prima facie showing that the protected conduct was a "motivating factor" in the Respondent's decision to suspend and discipline Aguilar, the Respondent has established, by a preponderance of the evidence, that the same action would have taken place even in the absence of the protected conduct.

were required to purchase their own tools and PPE. The Respondent started inquiries of its other facilities regarding who provided what to the employees and immediately started discussing providing tools to the maintenance employees in Holland. (R. Exhs. 11 and 12.) Habermehl admitted instructing human resources at the Holland plant to offer hand tools to the maintenance employees. (Tr. 65–68.) In Helfant's second meeting he told the employees that the Company could help out the employees in maintenance by providing "tools and learning." (Tr. 365–366.) Several weeks after that meeting with Helfant, the Respondent Facility Manager Guy Yondo informed the maintenance employees that the Company would order their toolboxes, and several weeks after that, in October/November 2017, the Respondent followed through with its promise and bought tools for the maintenance employees. (Tr. 370–372, 711–712, 1526–1529.)

After knowledge of the Union campaign, the Respondent also began revisiting the possibility of changing its attendance and vacation policies. (R. Exh. 12.) Respondent's internal communications make clear that the sudden interest in improving working conditions was directly related to unionization. In one such email, Senior Vice President Habermehl strategized that Respondent could not limit any proposed additional vacation benefits to "maintenance [employees] only without giving union organizations a lot of ammunition for the production group." (GC Exh. 8.)

On August 24, Rurka met with employees to "follow up" on the issues raised in the meetings held after Respondent discovered the organizing efforts. (GC Exh. 9.) Rurka told employees that the Respondent heard their concerns and was responding in a way that reinforced to employees that they were a "family." Rurka also said that the "most common concern" was about the attendance and vacation policies. Rurka also stated: "So we are going to try something new. We are going to change the vacation policy. . . ." (GC Exh. 9.) Furthermore, Rurka announced that Respondent was adding to the list of court appearances, any meetings or events related to immigration issues and expanding the list of medical visits qualifying for excused absences. Rurka also told employees "what [the Respondent is] changing is a good first step toward bringing our family back together," and "we acknowledge that [vacation] is an important issue to you . . . we don't want to come to you empty handed." He also announced changes to both the lock out policy and the PPE equipment that was provided, two issues that were specifically mentioned by the maintenance employees as the reasons they were considering Union representation. (GC Exh. 9.)

Two weeks after Helfant conducted meetings with employees where he solicited their complaints and informed them that he would do what he could do to remedy them, he traveled back to Holland to announce that the vacation and attendance policies were being updated and improved. Helfant said the Company was making policy changes, such as to the vacation and attendance policies, and that those changes were improvements over the existing policies. In those meetings, which included maintenance employees, Helfant also announced that the Company was changing its policy to purchase tools at no cost to employees.

About a week after Helfant's September meetings, Respondent summarized its improved policy changes and working conditions for employees in a one-page handout titled "Explanation of Changes to Policies" and issued it with their paychecks. The changes included: (1) allowing attendance points to drop off after 30 days instead of the current 60 day timeframe; (2) allowing employees to take pre-scheduled vacation time for medical appointments; (3) allowing absences to be taken for additional life events to be excused without the accrual of an attendance point; (4) allowing employees the right to use vacation time for a call off (up to five time a year); (5) using vacation time in 4 hour increments (where previously it had to be used in "full day increments"); and (6) other changes to the wellness program, holiday pay, the lock out/tag out procedure, and personal protective equipment for the employees. That document also announced the creation of another suggestion box for employees, and it encouraged them to use it. (GC Exh. 7.)

The Respondent's changes in policy and working conditions discussed above and listed in the "Explanation of Changes to Policy" handout, plus several more changes, were approved the first week of September and implemented on October 1, 2017. The vacation policy, which was a major source of complaints for several years, was changed and expanded to benefit the employees by providing that newer employees were given 5 days of vacation and senior employees received 2 more days of leave, and under some circumstances, leave was allowed in smaller increments without prior approval. The policy for PPE for maintenance employees was also changed, and as a follow up to that change, later in October/November 2017, Respondent changed its policy to order and purchase work tools for the maintenance employees. All of these changes were approved and implemented by the Respondent *after* knowledge of the Union organizing campaign.

In *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), the U.S. Supreme Court has held that an employer violates the Act when it grants a wage increase or other benefits for the purpose of inducing employees to vote against the union. The Supreme Court explained that Section 8(a)(1) "prohibits not only intrusive threats and promises, but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." Id. The standard articulated by the Court in *Exchange Parts* applies to allegations both that an employer unlawfully announced a benefit in violation of Section 8(a)(1),[64] and that it unlawfully implemented a benefit in violation of Section 8(a)(3) of the Act. See *In Home Health, Inc.*, 334 NLRB 281, 284 (2001); see also, *Perdue Farms*, 323 NLRB 345, 352–353 (1997), enf. denied in relevant part on other grounds 144 F.3d 830 (D.C. Cir. 1998).

The Board has held that an employer's legal duty in deciding whether to grant benefits to employees is to act as it would have if the union were not present. *Red's Express*, 268 NLRB 1154, 1155 (1984). The evidence in this case establishes a very strong inference that Respondent would not have granted the benefits to the employees if the Union was not present. The changes to vacation and attendance policies, while brought up and sought

[64] See e.g., *Village Thrift Store*, 272 NLRB 572 (1983).

by the human resources department many years before the Union campaign, were approved and implemented only several months after the Respondent found out about the organizing drive. In addition, evidence establishing that the Respondent's implementation of increased benefits was in response to and the result of the Union's presence is found in the contemporaneous unfair labor practice violations of solicitation of grievances and complaints to discourage the employees' support for the Union.

While the Board has inferred from the timing of such a grant of benefit that it was unlawful, the Respondent may nevertheless rebut that inference by showing that the timing of its action is explained by reasons other than the pending election. *B&D Plastics*, 302 NLRB 245 (1991). The Board applies the same test and analysis in unfair labor practice cases. *DMI Distribution of Delaware*, 334 NLRB 409, 410 fn. 9 (2001) (applying same analysis to unfair labor practice cases as to objections cases); See *Perdue Farms*, 323 NLRB 345, 352 (1997), enfd. in relevant part 144 F.3d 830 (D.C. Cir. 1998); *Desert Aggregates*, 340 NLRB 289, 290–291 (2003) citing *Holly Farms Corp.*, 311 NLRB 273, 274 (1993). In this case, the Respondent failed to rebut that inference.

The Respondent argues that it had been planning to change its vacation/attendance policies for a long time, but the evidence shows that changes to those policies had been in existence floating on the periphery since 2015. (R. Exhs. 11 and 12.) Other than exploratory emails between managers from time to time, there was no evidence that any change in policy had been agreed upon for discussion or implemented at any time before the Union organizing began. In fact, the evidence establishes that Respondent's owners were not receptive to improved vacation and attendance benefits for their employees prior to the organizing campaign. (R. Exhs. 11 and 12.) The Respondent was aware as early as 2015, if not earlier, that its vacation and attendance policies caused many employees to be dissatisfied and that human resources regularly heard about such concerns from employees. (Tr. 803, 1064, 1530.) Habermehl acknowledged that the Respondent started looking into the possibility of improving vacation benefits for employees around 2007, "a decade prior to 2017," but that when human resources would bring it up to senior management, they were told that "ownership doesn't believe in pay for time not worked." (Tr. 1530.)

Habermehl also testified that in February 2015, he had a discussion with Corporate leadership about a first-year maintenance employee at the non-union Ohio facility who was leaving his job, but would stay if he had more vacation. (Tr. 1537.) When Habermehl engaged in conversation with senior management officials about increasing vacation benefits for that employee as well as others, he "ended up getting the same answer we always got . . ." which was "we don't . . . pay for time not worked," and the options on changing employee vacation benefits "was shot down very quickly." (Tr. 1537.) Habermehl also testified that in April 2016, when he discussed with senior leadership, including Helfant, the fact that the lack of vacation time for first year employees was a "glaring hole," and after he provided Helfant with side-by-side comparisons for the facility, they "[kept] hitting a roadblock that we don't do pay for time not worked." (Tr. 1539.) Even in June 2016, a proposal on increasing vacation benefits for the production and maintenance employees at the non-union plants was given to senior leadership and "nothing really happened" as the position that "we don't pay for time not worked was kind of the prevalent attitude [from] ownership." (Tr. 1543–1544.) Habermehl also presented a "numbers crunch" on the vacation benefits sometime in 2016 to Helfant, who summarily rejected it and told him it was "not a good time." (Tr. 1545.)

Thus, the Respondent's assertion that the changes to the vacation policy were "in existence for a long time" is not supported by the record. Instead, the record establishes, from the admissions of the Respondent's own witnesses, that while changes to the vacation and attendance policy had been encouraged and presented to corporate ownership and senior leadership for consideration for many years, the Respondent consciously decided not to increase those benefits for the non-union employees until well after the Union's organizing campaign started at its facility. Then, despite a two-year period of no change, the matter was resolved within a month-and-a-half of learning about the Union's organizing campaign when the ownership authorized the changes in policy and implemented them on October 1, 2017. The Respondent also argues that it changed its policies at all its non-union facilities (R. Br. p. 77.), but, as noted above, the changes at Holland and the other non-union facilities took place only after Respondent's knowledge of the Union organizing and only after employees expressed their desire to see change in response to the Respondent's solicitations that occurred after the Union campaign.[65]

I find that the Respondent has not met its burden of showing that the timing of the improved policies and working conditions was based on reasons other than the Union organizing efforts. The announcement of the changes made by Respondent unlawfully interfered with the employees' exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act. *Register Guard*, 344 NLRB 1142 (2005). In addition, the implementation of the changes violated Section 8(a)(3) of the Act. *Thorgren Tool & Molding, Inc.*, 312 NLRB 628, 632 (1993).

*c. The Respondent's change in job position and wage increase for employee Nelson Langarita and wage increase for employee Apolonia Rios (complaint para. 22 and 25)*

In addition to its significant changes to policy impacting all hourly employees, Respondent also increased the terms and condition of work for several individual employees. Immediately after Helfant's solicitation of employee concerns and grievances on August 29, Apolonia Rios told Helfant that she had been

[65] I find the instant case distinguishable from *U.S. Cosmetics Corp.*, 368 NLRB No. 21, slip op. at 1–2 (2019), where the Board dismissed an allegation that an employer unlawfully implemented a wage increase because the General Counsel failed to meet his burden of proving that the employer changed the timing of a wage increase for employees in response to evidence of union organizing shown through the posting of a pro-union sign on July 9. Id. In that case, the Board relied on the fact that "the record established that the [employer] had received the necessary authorization for the wage increase before July 9. . . ." Id. In the instant case, the evidence establishes that the Respondent received authorization for changes to the vacation and attendance policies from the corporate ownership and leadership, and then implemented those changes, only after knowledge of the Union's organizing campaign.

demoted in March 2017 and had her wage rate reduced by nearly $3 per hour (from $16.45 to $13.70 an hour). After that conversation, Helfant told Rios he would look into it for her and he instructed the human resources department to check into and reconsider Rio's demotion and wage reduction. Approximately 2 weeks later, without significant explanation, Respondent in effect reversed its prior demotion of Rios and increased her wages to $15.40 per hour and she was issued a lump-sum backpay check for the difference in pay from the time of her demotion to that that time of reversal.

Around that same time, the Respondent issued an unexpected wage increase to known Union supporter Nelson Langarita, which occurred shortly after Habermehl held his meetings with employees and where Langarita asked about benefits employees received at Respondent unionized Virginia facility. With regard to Langarita's wage increase, the record reveals that he approached human resources with a request for more pay. The Respondent thereafter increased his pay from $14.15 to $15.40 per hour (GC Exh. 21) and Respondent placed him in a new position.

The timing of Respondent's decisions to grant these wage increases to two known union supporters during the Union's organizing drive, compels an inference of unlawful motive and that it was done as an attempt to persuade those Union supporters to abandon their support for the Union. In Rios' case in particular, that inference is based not just on the suspect timing, but the fact that Respondent's decision to demote Rios appeared significant and well thought out, which indicates that management believed her demotion was justified when it was issued. The burden now shifts to the Respondent to show that the timing of its actions were unrelated to these employees' union support and organizing efforts.

With regard to Apolonia Rio's situation, she held a "Lead" position, but in February 2017, she was placed on a Performance Improvement Plan (PIP) for performance issues. On March 7, 2017, months prior to the Union's organizing campaign, Rios was demoted for failing to comply with her PIP. Van Noy, who was personally involved in Rios' demotion, testified that the Respondent was unhappy with her performance and her demotion was well thought out and not issued lightly. Rios was demoted to a general labor position and her pay reduced from $16.45 to $14.15 per hour. At that time, Rios told management that her demotion was unjust and demanded an investigation, making a handwritten request to that effect on her Notice of Demotion. No investigation of her claims was performed, however, prior to the Union's organizing campaign.

After the Union drive commenced and Helfant held his meetings for the purpose of listening to employee complaints and attempting to remedy them, Rios approached him and explained her demotion and decrease in pay that she believed were unjust. Helfant told her that he would look into it for her and instructed the human resources department to reconsider Rios' demotion and investigate her complaint. Helfant told Van Noy that Rios was upset with her demotion and reduction in pay, and he asked her if she could do anything about it. Shortly after Helfant's request, Rios was summoned to human resources and was told Helfant had directed a reinvestigation into the circumstances of her demotion. Approximately 2 weeks after that, Rurka, Van Noy, and Cochran met with Rios and told her she had been given a new position and an increased wage rate. However, there was no change in her job duties and she performed the same general laborer work. In addition to increasing her wages from $14.15 to $15.90 per hour, Respondent issued her a lump sum payment for the difference between the wage rate she had prior to her demotion in March and the increased rate she just received in September, which amounted to around $1600 to $2000.

Even though Van Noy failed to articulate any basis for reversing Respondent's well thought out decision to demote Rio and instead issue her a wage increase and lump sum payment, she nevertheless denied that it was done because Rios was a union supporter. Instead, Van Noy only testified that she was directed by Helfant to look into the demotion that occurred approximately 6 months earlier, and Cochran told Rios that Helfant directed her to reinvestigate the circumstances of her demotion without offering any explanation or articulating the basis for doing so. (Tr. 402–404.) As way of explanation, the Respondent asserted in its post-hearing brief that "[w]ith regard to Ms. Rios, in her case a pay error had been made when she was demoted, and upon bringing [it] to the attention of management, it was corrected." (R. Br. p. 77.) That assertion has absolutely no support in the record. Critically, the Respondent also failed to explain why Rios was never provided an investigation of her assertion that her demotion was unfair when it occurred in March, while, shortly after the Union campaign started, she was provided with a reinvestigation of the circumstances of her demotion, without explanation. The Respondent's witnesses' denials that Rios wage increase and lump sum payment were unrelated to her union support and activity are simply not credible, plausible, or supported by the evidence.

In addition, while the Respondent presented evidence that other employees had been granted ad hoc wage increases upon request in the past, those examples are distinguishable. The examples cited concerned employees who were either downsized or transferred from other departments that were closed, and in the instant case, Rios' March 2017 demotion was for performance issues after she had unsuccessfully completed a performance improvement plan. Furthermore, the Respondent cited an example of a clerical employee who was pulled from her position and put into a production job. That clerical employee, however, did not have her pay changed and the details of her move to production, other than it was believed to be production based, was not reflected in the record.

Accordingly, the Respondent did not rebut the inference of unlawful motivation by showing that the timing of its actions was unrelated to the Rios' Union support and organizing efforts. The Respondent's implementation of these changes was therefore motivated by unlawful reasons and they interfered with the employees' exercise of their Section 7 rights, in violation of Section 8(a)(3) and (1) of the Act. *Montgomery Ward & Co.,* 288 NLRB 126 fn. 6 (1988), enf. denied on other grounds 904 F.2d 1156 (7th Cir. 1990); *Thorgren Tool & Molding, Inc.*, 312 NLRB 628, 632 (1993).

With regard to Respondent's pay increase and new job position to Langarita, shortly after Habermehl's meeting, Langarita told human resources that he deserved more pay for his job and that he was not being compensated for additional duties, such as data entry work in addition to his machine operator work.

Human resources investigated his claim and determined that he was, in fact, performing the duties of a "packaging specialist" where he was entering information in the computer and printing labels in order to keep the flow of product moving, which was a higher rated position than his general laborer position. Upon looking into Langarita's claim, Van Noy checked with RTE Department Manager Urasinski who confirmed that Langarita was given work responsibilities beyond his job classification. On that basis, on August 28 Langarita's hourly wages were increased from $14.15 to $15.40, and his job classification was changed to "packaging specialist" to better suit the work he was performing. The adjustment in title to specialist and the increase in pay for that position was not unusual, as it was a job position that existed in other departments at the Holland facility.[66]

I find that the Respondent presented a legitimate business reason and justification for changing Langarita's job position to packaging specialist and increasing his wages to the rate applicable for that position. The Respondent rebutted the inference of unlawful motivation by showing that the timing of its action was unrelated to the Langarita's Union organizing efforts. Thus, the Respondent did not violate the Act as alleged, and this complaint allegation will be dismissed.[67]

## CONCLUSIONS OF LAW

1. The Respondent, Boar's Head Provisions Co., Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The United Food & Commercial Workers International Union (UFCW), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by: threatening employees with the loss of benefits (including a 7 minute donning and doffing time allowance and bonuses); threatening that negotiations would start from zero to the minimum if employees selected the Union as their collective-bargaining representative; unlawfully interrogating employees about their union membership, activities and sympathies; soliciting employee complaints and grievances, including by statement and inducement to use the suggestion box, and promising to remedy them by increased benefits and improved terms and conditions of employment if the employees do not select the Union as their bargaining representative; promising employees that the vacation and attendance policy benefits would be changed and hand tools purchased at no cost to employees if they did not select the Union as their bargaining representative, and then granting those benefits to employees; conducting surveillance of employees union or protected activities; maintaining an overly broad rule that denies employees the right to wear unauthorized badges and pins on exterior garments; informing employees that the Union would not be able to get them reinstated if Respondent terminates them or telling them that they will end up in court, thereby informing them that it would be futile for them to select the Union as their bargaining representative; and increasing wages for employees to induce them to abandon support for the Union or any other labor organization.

4. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by: increasing benefits for employee Apolonia Rios by raising her wages and paying her retroactive backpay; and increasing benefits for employees by improving the attendance and vacation policies and by providing hand tools at no cost to its maintenance employees.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not otherwise violated the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be ordered to revise or rescind the rule stating that "wearing unauthorized badges, pins, or other items on helmet or exterior garments" was an example of misconduct that is very serious and will result in progressive discipline (Class II Offenses, 2.9 of the Employee Handbook). This is the standard remedy to assure that employees may engage in protected activity without fear of being subjected to unlawful rules. See *Hills & Dales General Hospital*, supra, slip op. at 2–3; see also *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). As stated therein, the Respondent may comply with the order of rescission by reprinting said rule without the unlawful language or, in order to save the expense of reprinting the whole employee handbook manual, it may supply its employees with handbook policy inserts stating that the unlawful rule has been rescinded or with lawfully worded policies on adhesive backing that will correct or cover the unlawful portion of the rule or the unlawfully broad portion of the rule, until it republishes the employee handbook rules without the unlawful provision. Any copies of the employee handbook that includes the unlawful rule must include the inserts before being distributed to employees. *Hills & Dales General Hospital*, supra, slip op. at 3; *Guardsmark, LLC*, supra at 812 fn. 8; See also *Bettie Page Clothing*, 359 NLRB 777, 778–779 (2013).[68]

In addition, in *Danbury Ambulance Service, Inc.*, 369 NLRB

[66] The Respondent presented evidence that it already had two packaging specialists in other departments.

[67] As mentioned above, the Respondent filed a reply brief to the General Counsel's post-hearing brief. In that brief, the Respondent sets forth additional arguments, including its assertion that the General Counsel's withdrawal of additional complaint allegations after the close of trial "call[ed] into question not only the other allegations, but also the credibility of the General Counsel's own witnesses" and its assertion that the General Counsel "mischaracterized the rule" pertaining to wearing pins and badges. The Respondent's arguments in its reply brief were considered and are found to lack merit.

[68] The General Counsel seeks a special remedy of notice reading in this case. (GC Br. p. 41.) In determining whether additional remedies are necessary to fully dissipate the coercive effect of unlawful discharges and other unfair labor practices, the Board has broad discretion in fashioning a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB 1350, 1354 (2014); *Excel Case Ready*, 334 NLRB 4, 4–5 (2001). I find that the unfair labor practices found in this case should be sufficiently remedied by the Board's traditional remedies, and that a

No. 68, slip op. at 3–4 (2020), the Board announced and implemented a temporary change in its standard notice-posting remedy to adapt to the ongoing Coronavirus pandemic.[69] The standard notice-posting provision requires respondents to post copies of the remedial notice within 14 days after the notice is served on the respondent by the regional office. With so many businesses closed due to the pandemic, however, this requirement has been modified as it is likely that many respondents may be unable to comply with the standard 14-day posting deadline. Furthermore, the Board noted that even if the notice could be posted in time, the whole point of the remedy will be defeated if employees (or members in union-respondent cases) are not present to read the notice. Accordingly, for the time being, the Board will omit from the notice-posting remedy the requirement that the notice be posted "within 14 days after service by the Region." Instead, it will provide that the notice must be posted within 14 days after the facility involved in the proceedings reopens and a substantial complement of employees have returned to work, and that it may not be posted until a substantial complement of employees have returned. In addition, employers that customarily communicate with their employees by electronic means may not be doing so while their businesses remain closed. Thus, any pandemic-related delay in the physical posting of paper notices will also apply to electronic distribution of the notice. The Board has held that these changes do not apply to respondents whose facilities remain open and staffed by a substantial complement of employees despite the pandemic. When conditions warrant, the Board will reinstate the standard language. Id., slip op. at 3–4.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[70]

ORDER

The Respondent, Boar's Head Provisions Co., Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of benefits (including a 7-minute donning and doffing time allowance and bonuses) and that negotiations would start from zero to the minimum if the employees select the Union as their collective-bargaining representative;

(b) Interrogating employees about their union membership, activities, and sympathies;

(c) Soliciting employee complaints and grievances (including by statement and inducement to use the suggestion box) and promising to remedy them by actions, including increased benefits and improved terms and condition of employment, if the employees do not select the Union as their collective bargaining representative;

(d) Conducting surveillance of employees' union or protected activities;

(e) Maintaining rules or policies that are overbroad by denying employees the right to wear unauthorized badges and pins on exterior garments;

(f) Promising increased benefits and terms and conditions of employment and granting increased employee benefits, including an increase in wages, increased vacation and attendance benefits, and purchasing tools at no cost for maintenance employees, to induce them to abandon support for the Union or any other labor organization;

(g) Informing employees that the Union would not be able to get them reinstated if Respondent discharges them or telling them that they will end up in court, thereby informing them that it would be futile for them to select the Union as their bargaining representative.

(h) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, revise or rescind employee rule or policy stating that "wearing unauthorized badges, pins, or other items on helmet or exterior garments" is an example of misconduct that is very serious and will result in progressive discipline (Class II Offenses, 2.9 of the Employee Handbook).

(b) Furnish all current employees with inserts for the current Employee Handbook that (1) advise employees that the above-mentioned unlawful rule or policy has been rescinded, or (2) provide employees with the language of the revised lawful rule or policy on adhesive backing that will cover the above-mentioned rule; or (3) publish and distribute to employees rules or policies that do not contain the above-mentioned unlawful rule or policy, or which contain or provide the language of the lawful rule or policy.

(c) Post at its Holland, Michigan facility copies of the attached notice marked "Appendix."[71] The notices shall be posted in English and Spanish, and any other languages spoken by employees at Respondent's Holland, Michigan facility. Copies of

special remedy of notice reading is not supported or warranted by the record evidence.

[69] The Board has broad discretionary authority under Sec. 10(c) of the Act to fashion remedies that will best effectuate the policies of the Act, and remedial matters are traditionally within the Board's province and may be addressed sua sponte. *Danbury Ambulance Service,* supra, slip op. at 3, fn. 3; *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996).

[70] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[71] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 14, 2020

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with the loss of benefits including the loss of "donning and doffing" time and bonuses if you support or choose to be represented by the United Food and Commercial Workers International Union (UFCW), AFL–CIO (the Union) or any other union.

WE WILL NOT inform you that negotiations will begin from zero to the minimum if you select the Union as your bargaining representative.

WE WILL NOT ask you what working conditions you would like to see changed or solicit your grievances, and then offer to change those working conditions or promise to remedy your grievances in order to discourage your union activity.

WE WILL NOT ask you whether you support the union or unlawfully interrogate you with regard to your union activities, support, or sympathies.

WE WILL NOT inform you that the Union will not be able to get you reinstated if we discharge you or that you will end up in court, thereby inferring or informing you that selecting the Union is futile.

WE WILL NOT conduct surveillance of your union activities and support.

WE WILL NOT grant or increase benefits for you, including making changes to our vacation and attendance policies or by providing hand tools to maintenance employees, in order to discourage you from engaging in union and/or protected concerted activities or dissuade you from supporting the Union.

WE WILL NOT increase benefits for you by raising your wages or paying you retroactive backpay in order to discourage you from engaging in union and/or protected concerted activities.

WE WILL NOT maintain rules of policies that are overbroad by denying you the right to wear unauthorized badges and pins on exterior garments.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL revise or rescind employee rules or policies that are overbroad by denying employees the right to wear unauthorized badges and pins on exterior garments, such as the rule that states "wearing unauthorized badges, pins, or other items on helmet or exterior garments" is an example of misconduct that is very serious and will result in progressive discipline (Class II Offenses, 2.9 of the Employee Handbook); and WE WILL advise you in writing that we have done so and that the unlawful rule or policy will no longer be enforced.

WE WILL furnish you with inserts for your current Employee Handbook that advise you that the above-mentioned policy has been rescinded or provide you with language of a lawful policy on adhesive backing that will cover the above-mentioned unlawful policy, or WE WILL publish and distribute to you a revised Employee Handbook that does not contain the above-mentioned unlawful rule or that provides the language of an lawful policy or rule.

BOAR'S HEAD PROVISIONS CO., INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-209874 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.